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TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1883.

No. 344.

JOHN P. THOMPSON AND EDWARD R. THOMPSON, JR., ADMINISTRATORS, &c., OF E. R. THOMPSON, DECEASED, PLAINTIFFS IN ERROR.

vs.

THE FIRST NATIONAL BANK OF TOLEDO, OHIO.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE NORTHERN DISTRICT OF OHIO.

FILED OCTOBER 8, 1881.

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1 The United States of America to the First National Bank of Toledo, Ohio, greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States, to be holden at Washington on the second Monday of October next, pursuant to a writ of error filed in the clerk's office of the Circuit Court of the United States for the western division of the northern district of Ohio, wherein John P. Thompson and Edward R. Thompson, jr., administrators with will annexed of E. R. Thompson, deceased, are plaintiffs in error, and you are defendant in error, to show cause, if any there be, why the judgment rendered against the said plaintiffs in error as in the said writ of error mentioned should not be corrected, and why speedy justice should not be done to the parties in that behalf.

Witness the Honorable John Baxter, circuit judge of the United States in and for the sixth circuit, &c., this 30th day of March, in the year of our Lord one thousand eight hundred and eighty-one.

JNO. BAXTER,
United States Circuit Judge in and for the Sixth Circuit.

2 Service of the within notice is hereby accepted, this 31st day of March, 1881.

BISSELL & GORRILL,
Att'ys for defendant, The 1st National Bank of Toledo, Ohio.

(Indorsed:) First National B'k v. W. H. Standley et —. Writ of error, citation, and acceptance of service.

3 *Writ of Error.*

UNITED STATES OF AMERICA, *ss.*

The President of the United States to the honorable the Judges of the Circuit Court of the United States for the northern district of Ohio, western division, greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said Circuit Court, before you, between The First National Bank of Toledo, Ohio, as plaintiff, and E. R. Thompson's administrators, viz., John P. Thompson and Edward R. Thompson, jr., as defendants, a manifest error hath happened, to the great damage of the said defendants, viz., John P. Thompson and Edward R. Thompson, administrators with will annexed of E. R. Thompson, deceased, as by the complaint appears.

We being willing that error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that

you have the same at Washington on the second Monday of
4 October next, in the said Supreme Court to be then and there held, that, the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein, to correct that error, what of right and according to the laws and customs of the United States should be done.

Witness the Honorable Morrison R. Waite, chief justice of the said Supreme Court, the 31st day of March, in the year of our Lord one thousand eight hundred and eighty-one.

[SEAL.] AUGUSTUS J. RICKS.
Clerk of the Circuit Court of the U. S., N. D. O.

March 31st, 1881.

Copy of the within writ this day received by plaintiff.

By BISSELL AND GORRILL,
Att'ys for plaintiff, The First National Bank, Toledo, Ohio.

5 *Return of Writ and Certificate.*

UNITED STATES OF AMERICA, }
Northern District of Ohio. }

I, Augustus J. Ricks, clerk of the United States Circuit Court within and for said district, do hereby certify that, in obedience to the command of the within writ of error, the court has duly searched the record and proceedings of the said court in the cause aforesaid, and now herewith transmit to the Supreme Court of the United States a full and complete transcript thereof.

In witness whereof, I have hereunto set my hand and affixed the seal of said Circuit Court, at office in the city of Toledo, this 20th day of June, A. D. 1881.

[SEAL.] AUGUSTUS J. RICKS,
Clerk.

6 *Petition.*

Circuit Court of the United States for the northern district of Ohio.

FIRST NATIONAL BANK, Toledo, Ohio, plaintiffs,
vs.
WILLIAM H. STANDLEY, WILLIAM H. WHITESIDE, JOSEPHUS ATKINSON, E. R. THOMPSON, (whose full first name is unknown,) and JOSEPH UHL, partners, under the name and style of "PEOPLE'S BANK," defendants. } Petition.

The First National Bank of Toledo, Ohio, plaintiffs in this suit, by Bissell & Gorrill, its attorneys, complain of William H. Standley, William H. Whiteside, Josephus Atkinson, E. R. Thompson, (whose full first name is unknown,) and Joseph Uhl, defendants in this suit, and says:

That on the 25th day of August, A. D. 1877, the plaintiff was, and still continues to be, a corporation organized under the laws of the United States passed for the purpose of providing a national
7 currency, secured by a pledge of United States bonds, and to provide for the circulation and redemption thereof, popularly known as the national banking act, and the laws passed supplemental thereto and amendatory thereof; and at said date S. S. Hubbard was the plaintiff's cashier, duly qualified and acting as such.

At said date the defendants, William H. Standley, William H. Whiteside, Josephus Atkinson, E. R. Thompson, and Joseph Uhl, were partners engaged in the business of private bankers in the town of Logansport and State of Indiana, under the name and style of People's Bank, Logansport, Indiana; and said defendant William H. Standley was acting as president and William H. Whiteside as cashier of said banking partnership, and as such were authorized by said partnership to bind said firm to pay such notes and drafts as they or either of them should sign for that purpose with their official signatures.

The full first name of defendant E. R. Thompson is to plaintiff unknown.

On or about the 25th day of August, A. D. 1877, the plaintiff, in the regular course of its business, discounted a draft for the sum of five thousand dollars drawn by said defendant William H. Whiteside, as cashier, on said People's Bank, Logansport, Indiana, payable to the order of S. S. Hubbard, cashier, in ninety days from date, and accepted by the defendants in writing, whereby defendants became indebted to plaintiff in said sum of five thousand dollars, pay-
8 able in ninety days from the date of said acceptance. The following is a copy of said draft or acceptance, with all credits and endorsements thereon:

"$5,000. LOGANSPORT, INDIANA, *August 25th*, 1877.

Ninety days after date pay to the order of S. S. Hubbard, cas., five thousand no 100 dollars.

To PEOPLES' BANK, *Logansport, Indiana.* } WILLIAM H. WHITESIDE, *Cashier.*"

Written across the face of said draft was the acceptance following: "Accepted, payable at First National Bank of Toledo, Ohio. Logansport, Aug. 25, '77; William H. Standley, pres't."

(Endorsed:) "Aug. 27, '77; rec'd on within $289.76 from credits in hand."

The foregoing draft was taken by S. S. Hubbard in his capacity as cashier of the plaintiff, and for the plaintiff, and not otherwise.

Said draft was given as a renewal of a draft of the same amount discounted by plaintiff for defendants on the 5th day of May, 1877, which former draft was made payable to S. S. Hubbard, cashier of plaintiff, in 90 days from its date, and became due on the day when the draft aforesaid was drawn and accepted.

Plaintiff says that it is now the owner and holder of the draft aforesaid, and it has often demanded payment thereof, which has been refused by defendants. There is now justly due to it upon said draft and cause of action from said defendants the full sum
9 of four thousand seven hundred and ten and 24-100 dollars, and interest from the 26th day of November, A. D. 1877, for which, with costs of suit, plaintiff asks judgment against defendants.

BISSELL & GORRILL,
Plaintiff.

STATE OF OHIO, *Lucas County*, } *ss.*

Mars Nearing, being duly sworn, says he is the vice-president of plaintiff, duly qualified as such; that the facts stated and allegations in plaintiff's foregoing petition are true, as he believes.

M. NEARING.

Sworn to before me and subscribed in my presence this 2nd day of November, 1878.

A. W. GLEASON,
Notary Public, Lucas County, O.

Precipe.

FIRST NATIONAL BANK, Toledo, Ohio, pl'ff,
vs.
WM. H. STANDLEY, WM. H. WHITESIDE, JOSEPHUS ATKINSON, E. R. THOMPSON, (full first name unknown,) JOSEPH UHL, &c., defendants.

Clerk U. S. Circuit Court, Northern District of Ohio:

Please issue summons to marshal of said district for said defendants, returnable according to law. Indorse petition for money only, amount claimed $5,000, with interest from November 25, 1877.

BISSELL & GORRILL,
Pl'ff's Att'ys.

10 *Summons.*

THE UNITED STATES OF AMERICA, *Northern District of Ohio*, } *ss.*

The President of the United States of America to the Marshal of the northern district of Ohio, greeting:

You are hereby commanded to notify William H. Standley, William H. Whiteside, Joseph Atkinson, E. R. Thompson, (whose full first name is unknown,) and Joseph Uhl, partners, under the firm

name and style of "People's Bank," that they have been sued by The First National Bank of Toledo, Ohio, in the Circuit Court of the United States within and for said district, and that unless they answer by the 30th day of November, A. D. 1878, the petition of the said plaintiff against them, filed in the clerk's office of said court, at Toledo, in said district, such petition will be taken as true, and judgment will be rendered accordingly.

You will make due return of this summons on the 11th day of November, A. D. 1878.

Witness the Honorable Morrison R. Waite, chief justice of the United States, this 2nd day of November, A. D. 1878, and in the 103d year of the Independence of the United States of America.

11 [SEAL.] A. J. RICKS, *Clerk.*
By O. T. CASE,
Deputy Clerk.

NORTHERN DISTRICT OF OHIO, *ss.*

On the 7th day of November, A. D. 1878, I delivered a true and duly certified copy of this writ to the within named E. R. Thompson, at Delaware, Ohio. The within named Wm. H. Standley, Wm. H. Whiteside, Joseph Atkinson, and Joseph Uhl, not found, nor have either of them a residence in this district.

N. B. PRENTICE,
U. S. Marshal.
By C. A. PRENTICE,
Deputy.

Service.....	$2 00
Copies (2).....	1 00
Actual expense in lieu of mileage...	8 25
	$11 25

(Indorsed:) Amount claimed for which, with interest from November 25, 1877, judgment will be taken if you fail to answer, $5,000,00. Returnable Nov. 11th, 1878. Rule for answer Nov. 30th, 1878. Returned and filed Nov. 9th, 1878. O. T. Case, deputy clerk.

12 *Answer of E. R. Thompson.*

Circuit Court of the United States for the northern district of Ohio.

FIRST NATIONAL BANK OF TOLEDO, OHIO, plaintiff,
vs.
WILLIAM H. STANDLEY, WILLIAM H. WHITESIDE, JOSEPH ATKINSON, E. R. THOMPSON, (whose full first name is unknown,) and JOSEPH UHL, partners under the name and style of "PEOPLE'S BANK," defendants.

And now comes the defendant, E. R. Thompson, and for his separate answer to said petition says: He admits the plaintiff is and was a

corporation as alleged in said petition, and that S. S. Hubbard was its cashier; he denies that on the 25th day of August, A. D. 1877, or at any time prior or subsequent to said date the defendants, William H. Standley, William H. Whiteside, Joseph Atkinson, E. R. Thompson, and Joseph Uhl, were partners engaged in the business of private bankers in the town of Logansport and State of
13 Indiana, or at any other place, under the name and style of People's Bank, Logansport, Indiana, or under any other name or style; he denies that the said defendant William H. Standley was acting as president and William H. Whitesides was acting as cashier of such partnership, and he denies that they were authorized to bind said defendants to pay such notes and drafts as they or either of them should sign for that purpose with their official signatures; and he denies that they or either of them had any authority or power to bind this defendant, E. R. Thompson, by any act by them or either of them done.

He admits the full first name of this defendant was unknown to the plaintiff, and says his full first name is Edward R. Thompson.

He admits that on the 25th day of August, A. D. 1877, the plaintiff discounted a draft for the sum of five thousand dollars, drawn by William H. Whiteside as cashier to "People's Bank," Logansport, Indiana, payable to the order S. S. Hubbard, cashier, in ninety days from date; but he denies that the said defendants accepted said draft in writing, or in any other way, and he denies the said defendants became indebted to said plaintiff in said sum of five thousand dollars, or in any other sum. This defendant admits the copy of said draft is correct, as well as the endorsements thereon, and that the said draft was given as a renewal of a draft of the same amount
14 discounted by plaintiff; but he denies the said former draft was discounted for said defendants.

This defendant denies there is now or ever has been due to plaintiff from said defendants on said draft, or in any other manner, the said sum of four thousand seven hundred and ten $\frac{24}{100}$ dollars and interest, or any other sum; and he denies said plaintiff is entitled to judgment against him for any sum whatever.

This defendant, further answering, says he was not on the 25th day of August, A. D. 1877, or at any other time prior or subsequent thereto, a partner with the said defendants, William H. Whiteside, William H. Standley, Joseph Atkinson, and Joseph Uhl, or with either of them, and that he was not a partner with said named defendants under the name and style of "People's Bank," or under any other name or style; and he says he is not liable to the plaintiff by reason of anything it has set up in said petition; and this defendant, having fully answered, asks to be hence dismissed with his reasonable costs.

SCRIBNER, HURD AND SCRIBNER,
CARPER AND VAN DEMAN,
Att'ys for defendant E. R. Thompson.

STATE OF OHIO, *Delaware County*, } ss.

E. R. Thompson, being sworn, on his oath says he is the
15 defendant herein, and that the facts stated and allegations in the above answer are true, as he believes.

EDWARD R. THOMPSON.

Sworn to by E. R. Thompson before me, and by him subscribed in my presence this 27th day of November, A. D. 1878.

B. F. FRESHWATER,
Notary Public in and for Delaware Co., O.

Filed Nov. 30, 1878.

Journal Order.

And afterwards, to wit, on the 3d day of December, A. D. 1879, being a day of the Dec. term of said court, the following proceedings were had, to wit:

This day came the plaintiff, by its attorneys, and suggested the death of E. R. Thompson, one of the defendants herein.

Motion.

Circuit Court United States, northern district of Ohio, western subdivision.

FIRST NATIONAL BANK OF TOLEDO, OHIO, plaintiffs, }
vs.
EDWARD R. THOMPSON, defendant. }

Now comes the plaintiff and moves the court for a conditional order of revival in this cause against John P. Thompson and
16 Edward R. Thompson, administrators with the will annexed of Edward R. Thompson, dec'd.

BISSELL & GORRILL,
Att'ys for Pl'ff.

Filed March 26, 1880.

And afterwards, to wit, on the 26th day of March, being a day of the December term of said court, the following order was made in this cause in this court, which follows in the words and figures, to wit:

FIRST NATIONAL BANK, Toledo, Ohio, pl'ff, }
vs. } No. 19.
EDWARD R. THOMPSON, defendant. }

Upon motion of plaintiff, and it having heretofore been suggested that the defendant Edward R. Thompson has departed this life since the last term of this court, and it now appearing to the court that

John P. Thompson and Edward R. Thompson, jr., are the duly-qualified administrators with will annexed of Edward R. Thompson, deceased, it is ordered that said John P. Thompson and Edward R. Thompson, jr., show cause by the 15th day of April, A. D. 1880, why the said action should not stand revived in the names of said John P. Thompson and Edward R. Thompson, jr., as such administrators.

17 *Entry of Appearance.*

FIRST NATIONAL BANK, Toledo, Ohio, plaintiff,
vs.
WILLIAM H. STANDLEY, EDWARD R. THOMPSON, et al., defendants.

We hereby waive the issue and service of the conditional order of revivor in the foregoing cause, and hereby enter our appearance and consent that said action shall stand revived in our names, John P. Thompson and Edward R. Thompson, jr., administrators with the will annexed of Edward R. Thompson, dec'd.

CARPER AND VAN DEMAN AND
SCRIBNER, HURD AND SCRIBNER,
Att'ys for Administrators.

Filed March 26, 1880.

Jury Empanelled.

And afterwards, to wit, on Tuesday, the 7th day of December, A. D. 1880, being a day of the December term of said court, before the Hon. Judges Baxter and Welker, the following proceedings were had in this cause, to wit:

This day came the parties by their respective counsel, and this cause having been reached for trial, came also a jury, to wit, R. R. Titus, Daniel Frisk, Jos. Shull, D. C. Fisher, P. P. Doering, Jno. N. Bevington, G. W. Money, W. R. Bryant, W. S. Felton, J. B. Beverstock, Madison Finck, and Elijah Kellogg, who, being
18 duly empanelled, were sworn according to law, and thereupon the trial of said cause proceeded, and testimony was offered by the parties but not closed.

And afterwards, to wit, on Wednesday, the 8th day of December, being a day of the December term of said court, the following proceedings were had in this cause:

This day came the parties by their respective counsel, and came also the jury as empanelled and sworn as heretofore named, and the trial proceeded; evidence was introduced but not closed, and the further hearing of this cause was continued until to-morrow morning.

And afterwards, on Thursday, December the 9th day, again came the parties by their respective counsel, and came also the jury as

empanelled and sworn as hereinbefore named, and the trial proceeded; evidence was introduced but not closed, and the further hearing of this cause was continued until to-morrow morning.

Verdict of Jury.

19 And afterwards, to wit, on Friday, the 10th day of December, A. D. 1880, being a day of the December term of said court, the following proceedings were had in this cause, to wit:

This day came again the parties by their respective counsel, and came also the jury as empanelled and sworn as hereinbefore named, and the trial proceeded, and the argument of counsel having been concluded, after receiving the charge of the court the jury retired to deliberate, and after mature deliberation the jurors aforesaid, upon their oaths aforesaid, returned into court their verdict in writing, in the words and figures following, to wit:

"We, the jury in this case, being duly empanelled and sworn, do find for the plaintiff and assess its damages to the sum of five thousand five hundred sixty-two and $\frac{37}{100}$ dollars.

"ELIJAH KELLOGG,
"*Foreman.*"

Motion for a New Trial.

Circuit Court United States, western division, northern district of Ohio.

THE FIRST NATIONAL BANK OF TOLEDO, OHIO,
vs.
WILLIAM H. STANDLEY et al.

The defendants, administrators with the will annexed of Edward R. Thompson, deceased, now come and move the court to set
20 aside the verdict and for a new trial herein, and base such motion on the following grounds:

1st. Said verdict is not sustained by sufficient evidence.

2nd. Said verdict is contrary to law.

3rd. The court on the trial erred in admitting incompetent evidence, which was objected to by the defendants.

4th. The court erred in excluding competent evidence which was offered by the defendants.

5th. The court erred in refusing to give to the jury instructions as requested by the defendants.

6th. The court erred in the charge as given to the jury, and which was excepted to by the defendants at the time the same was so given.

CARPER AND VAN DEMAN,
C. H. SCRIBNER AND J. C. LEE,
Att'ys for Defendants.

Filed Dec. 11th, 1880.

21 *Order overruling Motion for a new trial, and Judgment on Verdict.*

THE FIRST NATIONAL BANK OF TOLEDO, OHIO,
vs.
WILLIAM H. STANDLEY et al.

This day came the plaintiff and the defendants, John P. Thompson and Edward R. Thompson, jr., administrators with the will annexed of E. R. Thompson, deceased.

And thereupon the court, being fully advised, denied and overruled the motion of the said administrators to set aside the verdict herein rendered on the 10th day of December, A. D. 1880, and for a new trial herein; to which denial and overruling by the court said administrators then and there excepted and now except.

And thereupon, on motion of the plaintiff for judgment on the verdict, it is considered and adjudged that the plaintiff recover of the said defendants, John P. Thompson and Edward R. Thompson, jr., administrators with the will annexed of E. R. Thompson, deceased, the said sum of five thousand five hundred sixty-two and $\frac{37}{100}$ dollars, with interest from said 10th day of December, A. D. 1880, and its costs herein to be taxed, and in default of payment that execution issue, to be levied on the lands and tenements and the goods
22 and chattels of the estate of said E. R. Thompson, deceased.

To all of which judgments and orders the said administrators then and there excepted and now except.

And thereupon came the said administrators with the will annexed and tendered to the honorable judges of said Circuit Court, to wit, the Hon. John Baxter and Martin Welker, their certain bill of exceptions herein, and the same was thereupon duly allowed, and signed and sealed and ordered to be placed on file in this cause by the clerk, and to be of and remain a part of the record herein; all of which was done accordingly.

Bill of Exceptions.

In the Circuit Court of the United States for the northern district of Ohio, western division.

THE FIRST NATIONAL BANK OF TOLEDO, OHIO,
vs.
WILLIAM H. STANDLEY et al.

Be it remembered, that on the trial of this cause at the December term, A. D. 1880, of said court, the plaintiff gave testimony tending to show, among other things, that a partnership known as the
23 "People's Bank" was formed at Logansport, in the State of Indiana, about the 10th of April, A. D. 1871, for the purpose of carrying on a private banking business at the place aforesaid; that the contract of partnership was reduced to writing and signed about the date last aforesaid, at said town of Logansport, by William H. Whiteside, D. P. Baldwin, W. G. Nash, J. B. Shultz, Joseph Uhl,

Allen Richardson, Wm. H. Standley, George Stricker, and Josephus Atkinson; the name of the defendant E. R. Thompson was also subscribed to said articles at the date aforesaid by the said William H. Whiteside, who was the son-in-law of said E. R. Thompson. Said partnersnip was to continue for the period of one year.

The testimony given by the plaintiff also tended to show that late in the winter of 1870–1871, or early in the spring of 1871, the said E. R. Thompson was present at said town of Logansport, engaged as a promoter of the scheme of forming such partnership, and urged the defendant Joseph Uhl to consent to take stock therein to the amount of $2,000, representing that he (Thompson) desired to establish such banking institution, and that his son-in-law, Whiteside, was to be cashier of such partnership when formed; that Thompson then agreed to take $2,000 of the stock of such partnership when formed, for the purpose of inducing said Uhl to also agree to and take stock therein. Said Uhl was not then acquainted with the banking business, nor were any of the other of said persons named, except
24 said Thompson and said Whiteside. That said Thompson then represented that he had, before that time, had experience in such a banking partnership; that it was a money-making institution; that he (Thompson) was worth about $75,000.00, and would make said Uhl safe if he would join them in the formation of such partnership; that said Uhl (who was also a man of considerable means) then agreed to take the same amount of stock in said banking partnership that said Thompson would; and thereupon said Thompson, in the presence of said Joseph Uhl, William H. Standley, and others, authorized the said William H. Whiteside to sign his (Thompson's) name to said article of partnership, and to act for him in the organization of said bank, and to do all acts in the premises which he could do if personally present.

The said testimony of the plaintiff tended to show that the said partnership entered upon the business of banking at the town aforesaid, at or about the date aforesaid, under the said name of "The People's Bank;" that D. P. Baldwin was its president and William H. Whiteside its cashier; that about the first of April, 1872, the said Baldwin and Nash retired from said partnership, having first sold their interest in said bank to other members of said firm. New articles of partnership were executed. These articles were not signed by said Baldwin or Nash. The name of said E. R. Thomp-
25 son was subscribed to said articles by the said Whiteside. The said Thompson was not present on either occasion when his name was so subscribed to said articles, and the only authority shown to said Whiteside for signing said last mentioned articles was that alleged to have been given in the latter part of the winter of 1870–1871, or forepart of the spring of 1871, as aforesaid, and certain other testimony tending to show that said Thompson admitted receiving dividends from said bank in 1872 and 1873, and that he was a partner in said banking firm, and that said Whitesides was attending to his interests therein.

That the business of said bank was carried on without interruption from the original formation thereof until its failure, and no public notice of the reassociation of 1872 was shown to have been given, but merely notice of the retirement of said Baldwin and Nash, and no change at any time was made in the name of said firm.

That said banking firm, though having a nominal capital of $28,000, had a paid-up capital of only $2,800, and that during its first year of business, after paying expenses, it divided among its shareholders $3,410. In 1873 it in like manner divided $9,987, such dividends being made up in part of depositors' money.

The plaintiff's testimony also tended to show that after the said partnership commenced business as aforesaid, said Whiteside caused to be printed blank checks, certificates of deposit, and ad-
26 vertising circulars, which were used in said banking business, on which were printed the names of the partners, as stockholders in said partnership; that the name of the said Thompson appeared thereon as one of said partners; that there was also published at the direction of said Whiteside, in some of the newspapers of said town of Logansport, advertisements setting forth that said partnership was engaged in the business of banking as aforesaid, the names of the partners, and that all of the persons so named were individually liable for all of the debts of said firm; that the name of said Thompson appeared in such advertisements as one of said partners; that such advertisements appeared down to and through the year 1876. In such advertisement said Thompson was named as a stockholder and director, and his residence at Delaware, Ohio, given; and that the fact that he was so advertised as a director and stockholder was brought to his knowledge during the continuance of such advertisements, and that he admitted the truth of the published statement.

That numerous suits were brought by said banking partnership in courts of record in Indiana, prosecuted in the name of Thompson and others as partners composing said firm, in which suits judgments were rendered in favor of said firm; that upon the trial of one of said suits said Whiteside testified that said Thompson was a
27 partner, and such proof was filed in the Bankrupt Court, wherein such bankrupt proceedings were pending, as a valid proof of debt.

The testimony of plaintiff further tended to show that said partnership continued said banking business at Logansport, Indiana, under such firm name until the 25th day of August, 1877, at which time it failed in business and its assets passed into the hands of a receiver; that the members of said firm who remained until such dissolution, other than Uhl and Thompson, were insolvent.

That said Thompson, who, during all the period aforesaid, resided at Delaware, Ohio, was several times at said town of Logansport and in the banking-house of said partnership.

That while so at Logansport, the said Thompson admitted to Joseph Uhl, and others, in conversations then and there had, that he

had received dividends upon the shares subscribed for him in said partnership by said Whitesides; that the investment was a paying one; that he was a director and stockholder in said banking partnership.

These conversations were shown to have taken place with different persons at various times from the spring or summer of 1872 to the year 1876. It was also shown by the testimony of the plaintiff's witnesses that said Thompson, while at said banking-house as
28 aforesaid, had been introduced on two or three occasions as one of the stockholders and directors of said banking partnership, and that he made no disclaimer of his said alleged connection with said firm; that in some of said conversations said Thompson said he was interested in said partnership, and that said Whitesides was looking after his interest therein, all of which conversations were after the year 1871.

The testimony of the plaintiff also tended to show that it commenced doing business with said "People's Bank" in October, 1873; that an account was opened with said bank at that date, which was continued until the failure in August, 1877, as aforesaid. But no testimony was given showing that the plaintiff or any of its officers had knowledge during said period as to the persons who constituted said partnership; or of said advertisements published in the papers of Logansport as aforesaid; or of the fact that the name of said Thompson appeared upon said checks and certificates of deposit, or in said circulars as aforesaid, as one of said partners; or that said plaintiff or any of its officers, servants, or agents had knowledge of said conversations with said Thompson concerning his said alleged connection with said firm, or of any of said alleged statements by him relative to said matters, or that said Thompson had ever held himself out to the plaintiff as a member of said firm.

29 The defendants—the personal representatives of the said defendant E. R. Thompson—gave testimony tending to show, among other things, that said Thompson, for many years prior to the formation of said partnership, resided in Delaware, in the State of Ohio; that he continued to reside there until the time of his death, which occurred suddenly of paralysis, at Delaware, Ohio, in the month of November, 1879. The said testimony also tended to show that the said Thompson was at Logansport about the month of November, 1870, and at that time had a conversation with said Joseph Uhl, Wm. H. Standley, William H. Whitesides, and others, on the subject of forming a partnership for banking; that he was there again about the month of March, 1871, but saw none of the parties interested in said partnership; that he was not again at Logansport until after said partnership was formed, and that he was not there between March, A. D. 1871, and the fall of A. D. 1874. Said Thompsons gave testimony by said Wm. H. Whiteside, and others, tending to show that at the meeting at Uhl's mill said Thompson did not authorize said Whiteside to act for him in the organization of said bank, did not agree to take stock therein, and did not au-

thorize said Whiteside to sign his name to said articles of partnership; that he was at no time present at a meeting of the partners or stockholders in said partnership, or participated in the pro-
30 ceedings thereof. Said testimony also tended to show that he had no knowledge of said checks or certificates of deposit, or circulars, or newspaper advertisements; that he received no part of the dividends declared by said bank, which were made at least once in each year between 1871 and 1877; but, on the contrary, that all the dividends had been paid to the other parties; that certificates of stock in said partnership had, in April, 1873, been issued to all the parties whose names were subscribed to said second articles of partnership, except the said Thompson and Strecker, and that the dividends had been regularly declared thereon, except in Strecker's case, from the spring of 1872 down to the time of the suspension as aforesaid, but that none of said dividends and no part thereof had been declared to the said Thompson or received by him; that the name of the said Thompson appeared nowhere in the books of said firm, except in the stock book; that the only entry in the stock book concerning him was a charge of $2,000 on April 10, 1871, for his alleged subscription, and a credit under date of May 20, 1871, of $200, or a payment of 10 per cent. upon said alleged subscription. The testimony of said defendant also tended to show that said Thompson had no knowledge of this entry, and that he paid no part of said sum of $200; that said Thompson did not visit Logansport more
31 than twice during the existence of said banking firm, and not at all from March, 1871, till the fall of 1874, and not then again save in the spring of 1876; and that on the occasion of each of such said visits he stopped at the house of his daughter, the wife of the cashier, W. H. Whitesides; that said Whiteside did not inform said Thompson of the use made of his name in said bank until the fall of 1874, when he did tell him he had used his name, but did not inform him that it was then being used; that this conversation was at Whiteside's house, in Logansport, Indiana; and that said Thompson then said that his name must not be so used.

The testimony of the said defendants also tended to show that in the month of April, 1871, and before or about the time said partnership commenced business as aforesaid, the said Thompson, at Delaware, Ohio, received a letter from said William H. Whitesides, purporting to come from Logansport, Indiana, enclosing an assignment to the said Whitesides (except the signature) from the said Thompson, in the handwriting of the said Whitesides, of the stock in said partnership, subscribed in the name of the said Thompson, by the said Whitesides as aforesaid, in April, 1871; that the said Thompson, after he caused to be added the words "which you took for me" to said assignment, signed his name thereto, and enclosed the same, in a letter written at his dictation and signed by him, to the said Whitesides at Logansport, Indiana, aforesaid; that said letter with
32 said enclosure was mailed as aforesaid, and was received by said Whitesides, at Logansport, in the month of April, 1871,

and was by him shortly thereafter posted in said stock book at the place where the name of said Thompson appeared as aforesaid, and there remained until shortly before said failure; that in the month of May, 1873, said stock and $200 credit were carried by said Whiteside into the stock account of the said Whitesides with said partnership.

The testimony of the defendants also tended to show that after the lot of checks and certificates of deposit first printed had been used up, new checks and certificates were printed and used, on which the name of said Thompson did not appear, and other checks and certificates were printed in which none of the names of partners appeared.

Said plaintiff gave evidence tending to show that said assignment of stock was not posted or kept in said stock book, or known to the members of said firm till after this suit was begun; also tending to show that all of the alleged members of said firm at the time said bank failed were insolvent, except Thompson and Joseph Uhl.

The said defendants offered to prove upon said trial by said Whitesides and the wife of said Whitesides that said Thompson, after the time that plaintiff's proofs tended to show that said Thompson
33 had authorized Whitesides to sign his name and take stock for him as a partner, and before said partnership commenced business or any articles were signed as aforesaid, instructed the said Whitesides that he would not become a partner therein; that said defendants also gave testimony proving that the letters of said Thompson enclosing said assignments of stock aforesaid had been lost after the same had been received by said Whitesides, and they offered to prove the contents thereof; but the court refused to permit the defendants to prove either of the matters aforesaid, and excluded the testimony so offered; to each of which rulings respectively the said defendants by their counsel then and there excepted.

The testimony of the said defendants also tended to show that when the said Whitesides signed the said articles with the name of the said Thompson as aforesaid, he did so with the expectation that Thompson would take the stock from what he had said, and that upon his failure so to do he procured the assignment aforesaid and did himself pay in the capital that he had agreed said Thompson would pay in, and did himself receive the dividends that would have gone to said Thompson.

34 After the testimony had been closed, and during the argument of the case, counsel for said defendants requested the court to instruct the jury, that if they found from the testimony that the said E. R. Thompson was not in fact a member of said partnership, the plaintiff could not recover, unless it further appeared from the testimony that the said Thompson had knowingly permitted himself to be held out as a partner and that the plaintiff had knowledge thereof during its transactions with said partnership. The court refused to instruct the jury as requested, but, on the contrary, charged the jury as follows:

Charge of the Court to the Jury.

This suit, gentlemen of the jury, is predicated upon a bill drawn and accepted by the People's Bank of Logansport, Indiana, made payable to S. S. Hubbard, cashier of the 1st National Bank of Toledo. It is for $5,000, with a credit of $289.76 endorsed upon the paper. You will observe that E. R. Thompson, the defendant sued in this action, does not appear upon the face of this paper as a party to it; but it is alleged by the plaintiff that the People's Bank was a partnership for the purposes of banking, carried on under that name, and that Thompson was a partner in it.

35 The first question to be determined by you is whether he was at this time, August 25th, 1877, a partner in that firm. If you find that he was a partner at that time you need go no further, but upon the finding return a verdict in favor of the plaintiff. In behalf of the defendant it is insisted that he never was a partner in the People's Bank, and that if he was that he had sold and transferred his interest therein prior to the date of this paper, August 25th, 1877.

That is a question of fact to be ascertained and decided by you. If you find that he was at any time a partner in the firm, that he had prior to the execution of this paper withdrawn therefrom, it would be his duty or the duty of the People's Bank to notify the persons with whom they were accustomed to deal, including this plaintiff, of the fact of Thompson's withdrawal; and if they failed to give notice of his withdrawal and the plaintiff's bank did not otherwise learn the fact before it discounted this paper, the law is that it would be entitled to recover if they discounted the paper without a knowledge of Thompson's withdrawal, on the supposition that the partners continued as they were known to be before that time. They having received no notice from the defendant, nor from any one else for him, his liability would continue, and he would be responsible to the same extent and in the same manner as if he were then a partner.

36 How this fact is, is a question for you to determine upon the testimony you have heard. It is further insisted on behalf of the plaintiff that even if you find that the defendant was not a partner, but that he held himself out and permitted the officers of the "People's Bank" to hold him out to the world as a partner in the business, he would be estopped from denying his interest in the partnership as between him and the plaintiff; and although as between the defendant and the other partners he would be permitted to show that he had no interest in the bank, that he was not a partner therein, yet as between him and third parties, such as the plaintiff in this case, dealing with him or dealing with the bank, he would be estopped to deny his interest in said bank and his liability for its obligations. The evidence touching this part of the case I will not attempt to sum up; you have heard it and doubtless remember it. It consists of an advertisement, published in a local paper at Logans-

port through a series of years, representing Thompson as a stockholder and as a director in the bank. This advertisement was inserted by the officers of the bank. Upon some of their checks and certificates of deposit was a list or what purported to be a list of the stockholders and officers of the bank, Thompson's name included. The evidence was permitted to be pre-
37 sented for your consideration, but upon this condition, that this and like evidence is not to bear against defendant unless you are satisfied that the fact came to Thompson's knowledge. The mere fact that the officers of the bank published him to the world as a member of the firm, interested in their business, would not make him liable unless you are satisfied from all the circumstances and testimony in this case that he knew that they were using his name, and that he permitted the matter thus to stand and go forth to the world that he was a partner in the business and responsible for its obligations and liabilities. If you so understand the testimony, why, then, he is as much bound by it as if he had himself inserted the advertisement and published himself as a director upon the certificates of deposit and the checks of the bank. What he permitted to be done knowingly by another was in legal effect done by himself.

The defendants' counsel insists that no recovery can be had on this ground unless the plaintiff shows by the evidence upon the trial of the cause that he gave credit to the bank, looking to Thompson as a part of it. In other words, that the credit was extended in part to the defendant Thompson. We entertain a different opinion. It is not necessary for the plaintiff to show here that at the time it
38 discounted this paper it especially relied upon the defendant Thompson for its payment. If he had held himself out to the world in this public manner, through this advertisement and the other means brought to your attention, as an interested party, as liable for the obligations of the bank, the plaintiff is entitled to the benefit of that fact without showing that it knew that Thompson was a partner in the bank, or without showing that it specially gave credit to this particular defendant. These publications are of such a character as to entitle the plaintiff to rely upon them without such proof as the defendants' counsel insist ought to be made here; that is, that the plaintiff knew of this advertisement and relied, at the time it discounted said acceptance, upon Thompson for payment of the debt sued for.

I believe, gentlemen of the jury, that these are the only legal questions that have been raised in the case. There is a sort of divided responsibility in the administration of the law. It is the province and duty of the court to decide legal questions, and it is the province and duty of the jury to pass upon the facts. I deem it best not to encroach on the prerogatives of the jury in this respect. The testimony has been very full. In fact a great deal of testimony has been introduced that has no bear-

ing upon the case at all. It has been very fully argued by
39 counsel on both sides. We think the jury better able to pass upon the facts, and as the law has devolved that duly upon you, we will permit you to form your own opinion under the instructions which the court has given you. If he had been a partner, and withdrew before the execution of this paper, without notice to the plaintiff, or if he was not at any time a partner, but still permitted the officers of said bank to hold him out by advertisements or otherwise, and introduce him as a director and stockholder, without explanation or disclaimer, as is shown in evidence, he is estopped from denying his liability to the plaintiff. In either one of these events the plaintiff will be entitled to a verdict for the amount of the balance due upon the acceptance sued on, with interest from the time it fell due to the present.

If these facts, or any one of them, are not established to your satisfaction, then your verdict should be for defendant.

By Mr. SCRIBNER. I ask the Court to say to the jury that in the event they should find that Mr. Thompson withdrew from all connection with the association before it embarked in business in 1872, then that the rule that the court laid down is not applicable.

The Court replied: If, gentlemen of the jury, he had withdrawn from the People's Bank before it was organized, the proposi-
40 tion would still remain true: that if he permitted himself to be held out to the world by these publications and otherwise, as shown in evidence—and you will decide how far he permitted it—if he permitted himself to be thus held out as a stockholder or partner, thereby acquiescing in the representations made, the world had a right to treat him as a partner, and he would be liable accordingly.

To the refusal to charge the jury as requested as aforesaid, and to the charge as given in form aforesaid, the said defendants by their counsel then and there excepted.

The said defendants by their counsel then and there further excepted to so much of said charge as reads as follows:

"The defendants' counsel insist that no recovery can be had on this ground, unless the plaintiff shows by the evidence upon the trial of the cause that he gave credit to the bank, looking to the defendant as a part of it; in other words, that the credit was extended in part to the defendant Thompson. We entertain a different opinion. It is not necessary for the plaintiff to show here that at the time it discounted the acceptance sued on he especially relied upon the defendant Thompson for its payment. If Thompson had held himself out to the world in this public manner, through these
41 advertisements and the other means brought to your attention, as an interested party, as liable for the obligations of the bank, the plaintiff is entitled to the benefit of that fact, without

showing that he knew that Thompson was a partner in the bank, or without showing that he specially gave credit to this particular defendant. This publication is of such a character as to entitle the plaintiff to rely upon it, without such proof as the defendants' counsel insist ought to be made here; that is, that the plaintiff knew of these advertisements, etc., and relied upon Thompson for the payment of this debt."

Also to so much of said charge as reads as follows:

"If he was not at any time a partner, but still permitted the officers of said bank to hold him out by advertisements and otherwise, as shown in the evidence, and permitted himself to be introduced as a director and stockholder, as is shown by the evidence, if he permitted that to be done, then, as between him and third parties such as the plaintiff, he is estopped from denying his liability as a partner."

Also to so much of said charge as reads as follows:

"If he permitted himself to be held out to the world by these publications, or otherwise—and you will decide how far he
42 permitted it—if he permitted himself to be held out as a stockholder or partner, thereby acquiescing in the statement, the world, having no notice to the contrary, had the right to treat him as a partner, and he would be liable accordingly."

After the jury had been instructed as aforesaid they retired to deliberate, and afterwards, before agreeing on the verdict, returned into court and requested further instructions.

They were thereupon further instructed as follows:

"You are not to hold the defendant bound by the acts of the officers of the People's Bank in holding him out as a partner unless he had knowledge thereof and acquiesced therein. If he was introduced as a director or stockholder, and was silent as to his alleged connection with the bank, if he omitted to deny that he was a director or stockholder, this would be evidence of his being a partner, to be considered by you for what it is worth. If he knew that his name was upon the checks or certificates of deposit of the People's Bank, or was published in newspaper advertisements as a director or stockholder, and he neglected to notify the public that he was not such director or stockholder, it would be evidence tending to show that he was a partner."

43 To the instruction so given, the defendants by their counsel then and there excepted.

And the jury, having again retired to deliberate, returned a verdict for the plaintiff, as shown in the record of said cause.

Thereupon the defendants, upon the same day of the rendition of said verdict, filed in said court their motion in writing, for the reasons

therein stated, for a new trial, which motion was overruled by said court and judgment rendered upon said verdict.

To which ruling the defendants by their counsel then and there excepted.

And thereupon the said defendants prayed said court to sign and seal this their bill of exceptions, which is now done accordingly, and the same is upon their motion ordered to be made a part of the record in said cause.

JNO. BAXTER. [SEAL.]
M. WELKER. [SEAL.]

44 *Certificate.*

UNITED STATES OF AMERICA, *Northern District of Ohio,* } ss.

I, Augustus J. Ricks, clerk of the Circuit Court of the United States for said district, do hereby certify the above and foregoing to be a true, correct, and complete transcript of the record of all the proceedings had in said court in the cause wherein The First National Bank of Toledo, Ohio, is the complainant, and John P. Thompson and Edward R. Thompson, jr., administrators with the will annexed of Edward R. Thompson, deceased, are the defendants, as the same appears from the files and records of said court, now remaining in my custody.

In testimony whereof, I have hereunto set my hand and affixed the seal of said court, at my office in Toledo, in said district, this 20th day of June, A. D. 1881, and in the 105th year of the Independence of the United States of America.

[SEAL.] AUGUSTUS J. RICKS,
Clerk.

Assignment of Errors.

45 Supreme Court of the United States, October Term, A. D. 1881.

JOHN P. THOMPSON and EDWARD R. THOMPSON, JUNIOR, administrators with the will annexed, &c., plaintiffs in error,
versus
THE FIRST NATIONAL BANK OF TOLEDO, OHIO, defendants in error.

And now come the said John P. Thompson and Edward R. Thompson, junior, administrators with the will annexed of E. R. Thompson, deceased, by their attorneys, and say that in the record and proceedings of the Circuit Court of the United States for the western division of the northern district of Ohio, in a certain action therein pending, wherein The First National Bank of Toledo, Ohio, was

plaintiff, and the said plaintiffs in error were defendants,
46 and in which action judgment was rendered by said court at its December term, A. D. 1880, to wit, on the 29th day of March, A. D. 1881, thereof, against said plaintiffs in error in favor of said defendants in error, for the sum of $——— debt, and costs of suit in the further sum of $———, an authenticated transcript of which said record and proceedings is annexed to and returned with the writ of error issued in this cause, there are the following errors, to wit:

First. Said Circuit Court erred in refusing to permit the said defendants below to prove that before the alleged partnership articles were signed, as shown in the record, and before said partnership commenced business, the said E. R. Thompson instructed the said William H. Whitesides that he would not become a partner in said business.

47 Second. Said Circuit Court erred in refusing to permit the defendants below to give testimony offered by them of the contents of the letter to William H. Whitesides, written at the dictation of and signed by said E. R. Thompson in April, 1871, enclosing an assignment to said Whitesides of shares or stock in said People's Bank, subscribed by said Whitesides in the name of said Thompson, as shown in the record.

Third. Said Circuit Court erred in refusing to instruct the jury as requested by the defendants below.

Fourth. Said Circuit Court erred in the instructions given to the jury in said case and excepted to by the plaintiffs in error.

Fifth. The said Circuit Court erred in rendering judgment upon the verdict returned in said case. The said verdict is defective and insufficient in this: It does not show any finding
48 against the personal representatives of the estate of the said E. R. Thompson, deceased.

Sixth. The said Circuit Court erred in overruling the motion of the plaintiffs in error for a new trial in said cause.

Wherefore the said plaintiffs in error ask that the said judgment of said Circuit Court be reversed at the costs of said defendant in error, and that the plaintiffs in error be restored to all things they have lost by reason of said judgment, &c.

By CARPER & VAN DEMAN,
LEE & BROWN, AND
SCRIBNER, HURD & SCRIBNER,
their Attorneys.

(Indorsement upon cover:) N. Ohio, C. C. U. S.; No. 344. John P. Thompson and Edward R. Thompson, jr., administrators, &c., of E. R. Thompson, deceased, plaintiffs in error, *vs.* The First National Bank of Toledo, Ohio. Filed October 8th, 1881.

111-629

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Supreme Court of the United States.

JOHN P. THOMPSON AND EDWARD R. THOMPSON, JR., ADMINISTRATORS, ETC., OF E. R. THOMPSON, DECEASED,
PLAINTIFFS IN ERROR,

v.

THE FIRST NATIONAL BANK OF TOLEDO, OHIO, DEFENDANT IN ERROR.

In Error to the Circuit Court of the United States for the Northern District of Ohio, Western Division.

ARGUMENT FOR PLAINTIFFS IN ERROR,

By C. H. SCRIBNER, of Counsel.

THE B. F. WADE CO., TOLEDO, O.

Supreme Court of the United States.

JOHN P. THOMPSON AND EDWARD R. THOMPSON, JR., ADMINISTRATORS, ETC., OF E. R. THOMPSON, DECEASED,
PLAINTIFFS IN ERROR,

v.

THE FIRST NATIONAL BANK OF TOLEDO, OHIO, DEFENDANT IN ERROR.

In Error to the Circuit Court of the United States for the Northern District of Ohio, Western Division.

Argument for Plaintiff in Error, by C. H. SCRIBNER, of Counsel.

STATEMENT OF THE CASE.

The First National Bank of Toledo, Ohio, brought suit in the Circuit Court of the United States for the Northern District of Ohio, Western Division, against William H. Standley, William H. Whiteside, Josephus Atkinson, E. R. Thompson and Joseph Uhl, as partners under the name and style of "Peoples' Bank."

All the defendants, except Thompson, were non-residents of the State of Ohio, and he was the only party served with process, or who answered in the case.

The action was brought on a draft purporting to be drawn by William H. Whiteside, cashier, on the Peoples' Bank, Logansport, Indiana, for $5,000, dated Logansport, Indiana, August 25, 1877, payable ninety days after date, to the order of S. S. Hubbard, cashier. The draft was accepted by William H. Standley, president, payable at the First National Bank of Toledo, Ohio.

The petition alleged that said draft was taken by Mr. Hubbard as cashier of the plaintiff, and in "renewal of a draft of the same amount discounted by the plaintiff for the defendants on the 5th of May, 1877; which former draft was made payable to S. S. Hubbard, cashier of plaintiff, in ninety days from its date, and became due on the day when the draft aforesaid was drawn and accepted."

The petition also contained the following averments:

"At the said date, [August 25, 1877] the defendants, William H. Standley, William H. Whiteside, Josephus Atkinson, E. R. Thompson, and Joseph Uhl, were partners engaged in the business of private bankers in the town of Logansport and State of Indiana, under the name and style of Peoples' Bank, Logansport, Indiana; and said defendant William H. Standley was acting as president and William H. Whiteside as cashier of said banking partnership, and as such were authorized by said partnership to bind

said firm to pay such notes and drafts as they or either of them should sign for that purpose with their official signatures."

In his answer, the defendant, Thompson, denied all the allegations of the petition charging that he was a partner. He said:

"He denies that on the 25th day of August, A. D. 1877, or at any time prior or subsequent to said date the defendants, William H. Standley, William H. Whiteside, Joseph Atkinson, E. R. Thompson, and Joseph Uhl, were partners engaged in the business of private bankers in the town of Logansport and State of Indiana, or at any other place, under the name and style of Peoples' Bank, Logansport, Indiana, or under any other name or style; he denies that the said defendant William H. Standley was acting as president and William H. Whiteside was acting as cashier of such partnership, and he denies that they were authorized to bind said defendants to pay such notes and drafts as they or either of them should sign for that purpose with their official signatures; and he denies that they or either of them had any authority or power to bind this defendant, E. R. Thompson, by any act by them or either of them done."

"He admits that on the 25th day of August, A. D. 1877, the plaintiff discounted a draft for the sum of five thousand dollars, drawn by William H. Whiteside as cashier to "Peoples' Bank," Logansport, Indiana, payable to the order of S. S. Hubbard, cashier, in ninety days from date; but he denies that the said defendants accepted said draft in writing, or in any other way, and he denies the said defendants became indebt-

ed to said plaintiff, in said sum of five thousand dollars, or in any other sum. This defendant admits the copy of said draft is correct, as well as the endorsements thereon, and that the said draft was given as a renewal of a draft of the same amount discounted by plaintiff; but he denies the said former draft was discounted for said defendants."

"This defendant, further answering, says he was not on the 25th day of August, A. D. 1877, or at any other time prior or subsequent thereto, a partner with the said defendants, William H. Whiteside, William H. Standley, Joseph Atkinson, and Joseph Uhl, or with either of them, and that he was not a partner with said named defendants under the name and style of "Peoples' Bank," or under any other name or style; and he says he is not liable to the plaintiff by reason of anything it has set up in said petition."

The defendant died before the case was brought to trial. The action was revived against his personal representatives, the present plaintiffs in error. A trial was had at the December term, 1880, of the Circuit Court, and resulted in a verdict in favor of the Bank. A motion for a new trial by the administrators of Thompson was overruled and judgment rendered on the verdict, to which ruling exceptions were taken by the administrators. A bill of exceptions was also taken by them, and made part of the record. The present proceeding is brought to reverse the judgment of the Circuit Court.

The following from the bill of exceptions, shows the

character of the proof given by the bank in support of its claim:

"Be it remembered, that on the trial of this cause at the December term, A. D. 1880, of said court, the plaintiff gave testimony tending to show, among other things, that a partnership known as the "Peoples' Bank" was formed at Logansport, in the State of Indiana, about the 10th of April, A. D. 1871, for the purpose of carrying on a private banking business at the place aforesaid; that the contract of partnership was reduced to writing and signed about the date last aforesaid, at said town of Logansport, by William H. Whiteside, D. P. Baldwin, W. G. Nash, J. B. Schultz, Joseph Uhl, Allen Richardson, Wm. H. Standley, George Stricker, and Josephus Atkinson; the name of the defendant E. R. Thompson was also subscribed to said articles at the date aforesaid by the said William H. Whiteside, who was the son-in-law of said E. R. Thompson. Said partnership was to continue for the period of one year.

"The testimony given by the plaintiff also tended to show that late in the winter of 1870-1871, or early in the Spring of 1871, the said E. R. Thompson was present at said town of Logansport, engaged as a promoter of the scheme of forming such partnership, and urged the defendant, Joseph Uhl to consent to take stock therein to the amount to $2,000, representing that he (Thompson) desired to establish such banking institution, and that his son-in-law, Whiteside, was to be cashier of such partnership when formed; that Thompson then agreed to take $2,000 of the stock of such partnership when formed, for the purpose of inducing said Uhl to also agree to

and take stock therein. Said Uhl was not then acquainted with the banking business, nor were any of the other of said persons named, except said Thompson and said Whiteside. That said Thompson then represented that he had, before that time, had experience in such a banking partnership; that it was a money-making institution; that he (Thompson) was worth about $75,000 00, and would make said Uhl safe if he would join them in the formation of such partnership; that said Uhl (who was also a man of considerable means) then agreed to take the same amount of stock in said banking partnership that said Thompson would; and thereupon said Thompson, in the presence of said Joseph Uhl, William H. Standley, and others, authorized the said William H. Whiteside to sign his (Thompson's) name to said article of partnership, and to act for him in the organization of said bank, and to do all acts in the premises which he could do if personally present.

"The said testimony of the plaintiff tended to show that the said partnership entered upon the business of banking at the town aforesaid, at or about the date aforesaid, under the said name of "The Peoples' Bank;" that D. P. Baldwin was its president and William H. Whiteside its cashier; that about the first of April, 1872, the said Baldwin and Nash retired from said partnership, having first sold their interest in said bank to other members of said firm. New articles of partnership were executed. These articles were not signed by said Baldwin or Nash. The name of said E. R. Thompson was subscribed to said articles by the said Whiteside. The said Thompson was not present on either occasion when his name was so subscribed to said articles, and the only authority shown to said

Whiteside for signing said last mentioned articles was that alleged to have been given in the latter part of the winter of 1870-1871, or forepart of the spring of 1871, as aforesaid, and certain other testimony tending to show that said Thompson admitted receiving dividends from said bank in 1872 and 1873, and that he was a partner in said banking firm, and that said Whiteside was attending to his interests therein.

"That the business of said bank was carried on without interruption from the original formation thereof until its failure, and no public notice of the reassociation of 1872 was shown to have been given, but merely notice of the retirement of said Baldwin and Nash, and no change at any time was made in the name of said firm.

"That said banking firm, though having a nominal capital of $28,000, had a paid-up capital of only $2,800, and that during its first year of business, after paying expenses, it divided among its shareholders $3,410. In 1873, it in like manner, divided $9,987, such dividends being made up in part of depositors' money.

"The plaintiff's testimony also tended to show that after the said partnership commenced business as aforesaid, said Whiteside caused to be printed blank checks, certificates of deposit, and advertising circulars, which were used in said banking business, on which were printed the names of the partners, as stockholders in said partnership; that the name of the said Thompson appeared thereon as one of said partners; that there was also published at the direction of said Whiteside, in some of the newspapers of said town of Logansport, advertisements setting forth that said partnership was engaged in the business of banking as aforesaid,

the names of the partners, and that all of the persons so named were individually liable for all of the debts of said firm; that the name of said Thompson appeared in such advertisements as one of said partners; that such advertisements appeared down to and through the year 1876. In such advertisement said Thompson was named as a stockholder and director, and his residence at Delaware, Ohio, given; and that the fact that he was so advertised as a director and stockholder was brought to his knowledge during the continuance of such advertisements, and that he admitted the truth of the published statement.

"That numerous suits were brought by said banking partnership in courts of record in Indiana, prosecuted in the name of Thompson and others as partners composing said firm, in which suits judgments were rendered in favor of said firm; that upon the trial of one of said suits said Whiteside testified that said Thompson was a partner, and such proof was filed in the Bankrupt Court, wherein such bankrupt proceedings were pending, as a valid proof of debt.

The testimony of plaintiff further tended to show that said partnership continued said banking business at Logansport, Indiana, under such firm name until the 25th day of August, 1877, at which time it failed in business and its assets passed into the hands of a receiver; that the members of said firm who remained until such dissolution, other than Uhl and Thompson, were insolvent.

"That said Thompson, who, during all the period aforesaid, resided at Delaware, Ohio, was several times at said town of Logansport and in the banking-house of said partnership.

"That while so at Logansport, the said Thompson admitted to Joseph Uhl, and others, in conversations then and there had, that he had received dividends upon the shares subscribed for him in said partnership by said Whiteside; that the investment was a paying one; that he was a director and stockholder in said banking partnership.

"These conversations were shown to have taken place with different persons at various times from the spring or summer of 1872 to the year 1876. It was also shown by the testimony of the plaintiff's witnesses that said Thompson, while at said banking house as aforesaid, had been introduced on two or three occasions as one of the stockholders and directors of said banking partnership, and that he made no disclaimer of his said alleged connection with said firm; that in some of said conversations said Thompson said he was interested in said partnership, and that said Whiteside was looking after his interest therein, all of which conversations were after the year 1871.

"The testimony of the plaintiff also tended to show that it commenced doing business with said "Peoples' Bank" in October, 1873; that an account was opened with said bank at that date, which was continued until the failure in August, 1877, as aforesaid. But no testimony was given showing that the plaintiff or any of its officers had knowledge during said period as to the persons who constituted said partnership; or of said advertisements published in the papers of Logansport as aforesaid; or of the fact that the name of said Thompson appeared upon said checks and certificates of deposit, or in said circulars as aforesaid, as one of said partners; or that said plaintiff or any of its officers, servants, or agents had knowledge of said conversa-

tions with said Thompson concerning his said alleged connection with said firm, or of any of said alleged statements by him relative to said matters, or that said Thompson had ever held himself out to the plaintiff as a member of said firm."

From the bill of exceptions we also extract the following, showing the facts which the evidence adduced by the defendants below tended to establish:

"The defendants—the personal representatives of the said defendant E. R. Thompson—gave testimony tending to show, among other things, that said Thompson, for many years prior to the formation of said partnership, resided in Delaware, in the State of Ohio; that he continued to reside there until the time of his death, which occurred suddenly of paralysis, at Delaware, Ohio, in the month of November, 1879. The said testimony also tended to show that the said Thompson was at Logansport about the month of November, 1870, and at that time had a conversation with said Joseph Uhl, Wm. H. Standley, William H. Whiteside, and others, on the subject of forming a partnership for banking; that he was there again about the month of March, 1871, but saw none of the parties interested in said partnership; that he was not again at Logansport until after said partnership was formed, and that he was not there between March, A. D. 1871, and the fall of A. D. 1874. Said Thompsons gave testimony by said Wm. H. Whiteside, and others, tending to show that at the meeting at Uhl's mill said Thompson did not authorize said Whiteside to act for him in the organization of said bank, did not agree to take stock therein, and did not authorize said Whiteside to sign his name to said articles of partnership;

that he was at no time present at a meeting of the partners or stockholders in said partnership, or participated in the proceedings thereof. Said testimony also tended to show that he had no knowledge of said checks or certificates of deposit, or circulars, or newspaper advertisements; that he received no part of the dividends declared by said bank, which were made at least once in each year between 1871 and 1877; but, on the contrary, that all the dividends had been paid to the other parties; that certificates of stock in said partnership had, in April, 1873, been issued to all the parties whose names were subscribed to said second articles of partnership, except the said Thompson and Strecker, and that the dividends had been regularly declared thereon, except in Strecker's case, from the spring of 1872 down to the time of the suspension as aforesaid; but that none of said dividends and no part thereof had been declared to the said Thompson or received by him; that the name of the said Thompson appeared nowhere in the books of said firm, except in the stock book; that the only entry in the stock book concerning him was a charge of $2,000 on April 10, 1871, for his alleged subscription, and a credit under date of May 20, 1871, of $200, or a payment of 10 per cent. upon said alleged subscription. The testimony of said defendants also tended to show that said Thompson had no knowledge of this entry, and that he paid no part of said sum of $200; that said Thompson did not visit Logansport more than twice during the existence of said banking firm, and not at all from March, 1871, till the fall of 1874, and not then again save in the spring of 1876; and that on the occasion of each of such visits he stopped at the house of his daughter, the wife of the cashier, W. H. Whiteside; that said Whiteside did not inform

said Thompson of the use made of his name in said bank until the fall of 1874, when he did tell him he had used his name, but did not inform him that it was then being used; that this conversation was at Whiteside's house, in Logansport, Indiana; and that said Thompson then said that his name must not be so used.

"The testimony of the said defendants also tended to show that in the month of April, 1871, and before or about the time said partnership commenced business as aforesaid, the said Thompson, at Delaware, Ohio, received a letter from said William H. Whiteside, purporting to come from Logansport, Indiana, enclosing an assignment to the said Whiteside (except the signature) from the said Thompson, in the handwriting of the said Whiteside, of the stock in said partnership, subscribed in the name of the said Thompson, by the said Whiteside as aforesaid, in April, 1871; that the said Thompson, after he caused to be added the words "which you took for me" to said assignment, signed his name thereto, and enclosed the same, in a letter written at his dictation and signed by him, to the said Whiteside at Logansport, Indiana, aforesaid; that said letter with said enclosure was mailed as aforesaid, and was received by said Whiteside, at Logansport, in the month of April, 1871, and was by him shortly thereafter pasted in said stock book at the place where the name of said Thompson appeared as aforesaid, and there remained until shortly before said failure; that in the month of May, 1873, said stock and $200 credit were carried by said Whiteside into the stock account of the said Whiteside with said partnership.

"The testimony of the defendants also tended to show that after the lot of checks and certificates of

deposit first printed had been used up, new checks and certificates were printed and used, on which the name of said Thompson did not appear, and other checks and certificates were printed in which none of the names of partners appeared.

"Said plaintiff gave evidence tending to show that said assignment of stock was not pasted or kept in said stock book, or known to the members of said firm till after this suit was begun; also tending to show that all of the alleged members of said firm at the time said bank failed were insolvent, except Thompson and Joseph Uhl.

"The said defendants offered to prove upon said trial by said Whiteside and the wife of said Whiteside that said Thompson, after the time that plaintiff's proofs tended to show that said Thompson had authorized Whiteside to sign his name and take stock for him as a partner, and before said partnership commenced business or any articles were signed as aforesaid, instructed the said Whiteside that he would not become a partner therein; that said defendants also gave testimony proving that the letter of said Thompson enclosing said assignment of stock aforesaid had been lost after the same had been received by said Whiteside, and they offered to prove the contents thereof; but the court refused to permit the defendants to prove either of the matters aforesaid, and excluded the testimony so offered; to each of which rulings respectively the said defendants by their counsel then and there excepted.

"The testimony of the said defendants also tended to show that when the said Whiteside signed the said articles with the name of the said Thompson as afore-

said, he did so with the expectation that Thompson would take the stock from what he had said, and that upon his failure so to do he procured the assignment aforesaid and did himself pay in the capital that he had agreed said Thompson would pay in, and did himself receive the dividends that would have gone to said Thompson."

After the testimony had been closed, and during the argument of the case, counsel for said defendants requested the court to instruct the jury, that if they found from the testimony that the said E. R. Thompson was not in fact a member of said partnership, the plaintiff could not recover, unless it further appeared from the testimony that the said Thompson had knowingly permitted himself to be held out as a partner and that the plaintiff had knowledge thereof during its transactions with said partnership. The court refused to instruct the jury as requested; to which refusal the defendants by their counsel then and there excepted. (Printed Rec. pp., 15 and 18.)

At the conclusion of the charge of the Court, counsel for defendant also made the following request:

"I ask the Court to say to the jury that in the event they should find that Mr. Thompson withdrew from all connection with the association before it embarked in business in 1872, then that the rule that the court laid down is not applicable."

"The Court replied: If, gentlemen of the jury, he had withdrawn from the Peoples' Bank before it was organized, the proposition would still remain true; that if he permitted himself to be held out to the world by these publications and otherwise, as shown in evidence —and you will decide how far he permitted it—if he

permitted himself to be thus held out as a stockholder or partner, thereby acquiescing in the representations made, the world had a right to treat him as a partner, and he would be liable accordingly."

To which refusal to charge as requested, and to the charge as given, counsel for defendants then and there excepted. (Printed Rec., p. 18, also p. 19.)

The charge of the Court to the jury upon the whole case, is set out in the bill of exceptions. (Printed Record, pp. 16-18.) The defendants excepted to the charge as given, and also to certain specific portions of it as below shown.

"The said defendants by their counsel then and there further excepted to so much of said charge as reads as follows:

"The defendants' counsel insist that no recovery can be had on this ground, unless the plaintiff shows by the evidence upon the trial of the cause that he gave credit to the bank, looking to the defendant as a part of it; in other words, that the credit was extended in part to the defendant Thompson. We entertain a different opinion. It is not necessary for the plaintiff to show here that at the time it discounted the acceptance sued on he especially relied upon the defendant Thompson for its payment. If Thompson had held himself out to the world in this public manner, through these advertisements and the other means brought to your attention, as an interested party, as liable for the obligations of the bank, the plaintiff is entitled to the benefit of that fact, without showing that he knew that Thompson was a partner in the bank, or without showing that he specially gave credit to this particular de-

fendant. This publication is of such a character as to entitle the plaintiff to rely upon it, without such proof as the defendants' counsel insist ought to be made here; that is, that the plaintiff knew of these advertisements, etc., and relied upon Thompson for the payment of this debt."

"Also to so much of said charge as read as follows:

"If he was not at any time a partner, but still permitted the officers of said bank to hold him out by advertisements and otherwise, as shown in the evidence, and permitted himself to be introduced as a director and stockholder, as is shown by the evidence, if he permitted that to be done, then, as between him and third parties such as the plaintiff, he is estopped from denying his liability as a partner." (Printed Record, pp. 18-19.)

The portions of the record above given present the questions to be considered and determined by the Court.

The errors assigned are as follows:

"First. Said Circuit Court erred in refusing to permit the said defendants below to prove that before the alleged partnership articles were signed, as shown in the record, and before said partnership commenced business, the said E. R. Thompson instructed the said William H. Whiteside that he would not become a partner in said business.

"Second. Said Circuit Court erred in refusing to permit the defendants below to give testimony offered by them of the contents of the letter to William H. Whiteside, written at the dictation of and signed by

said E. R. Thompson in April, 1871, enclosing an assignment to said Whiteside of shares or stock in said Peoples' Bank, subscribed by said Whiteside in the name of said Thompson, as shown in the record.

"Third. Said Circuit Court erred in refusing to instruct the jury as requested by the defendants below.

"Fourth. Said Circuit Court erred in the instructions given to the jury in said case and excepted to by the plaintiffs in error.

"Fifth. The said Circuit Court erred in rendering judgment upon the verdict returned in said case. The said verdict is defective and insufficient in this: It does not show any finding against the personal representatives of the estate of the said E. R. Thompson, deceased.

"Sixth. The said Circuit Court erred in overruling the motion of the plaintiffs in error for a new trial in said cause." (Printed Rec., p. 21).

ARGUMENT.

The plaintiff proceeded in its action upon the ground that the defendant, E. R. Thompson, was a partner in the banking firm known as the "Peoples' Bank." The direct averment of the petition is, that he was such partner on the 25th of August, 1877, the date of the acceptance sued upon. There is no averment that he was a partner prior to that date, unless we construe the subsequent allegation that the draft in suit was given in renewal of a previous draft dated May 5, 1877.

discounted "for defendants," as an indirect claim that he was a partner at the last named date.

The defendant, in his answer denied in the most explicit terms, that he was ever a member of, or connected with the alleged partnership. Upon the issue so made, testimony was given on both sides as shown in the bill of exceptions. In this connection arises the question presented by the first assignment of error, which is as follows:

First. Said Circuit Court erred in refusing to permit the said defendants below to prove that before the alleged partnership articles were signed, as shown in the record, and before said partnership commenced business, the said E. R. Thompson instructed the said William H. Whiteside that he would not become a partner in said business.

In order to show precisely what it was that the defendants offered to prove upon this point, we here quote from the bill of exceptions:

The said defendants offered to prove upon said trial by said Whiteside and the wife of said Whiteside that said Thompson, after the time that plaintiff's proofs tended to show that said Thompson had authorized Whiteside to sign his name and take stock for him as a partner, and before said partnership commenced business or any articles were signed as aforesaid, instructed the said Whiteside that he would not become a partner therein. (Printed Rec., 15).

The Court refused to permit this proof to be made, and the defendants excepted. (Ibid.)

As already stated, one of the issues made in the

case, and the only issue presented by the pleadings, was as to whether or not E. R. Thompson was *in fact* a partner in the banking firm referred to. The plaintiff undertook to establish by testimony that he was a partner. It was not claimed that he had himself signed the articles of co-partnership, but that, previously to the execution of the articles, he had authorized William H. Whiteside to sign them for him, and that in pursuance of the authority so conferred, the name of Thompson had been signed to the articles by Whiteside. (Printed Record, p. 11 to bottom of page). The defendants below offered to prove that after the time referred to in the testimony of the plaintiff below, and before the partnership had been formed or the articles signed, Mr. Thompson refused to become a partner, and so instructed Whiteside. In other words, that if Thompson had at one time intended to become a partner, and authorized Whiteside to execute the articles in his name and behalf, this purpose was afterwards, and before the partnership was formed, changed, and the authority of Whiteside withdrawn. As to a creditor seeking to establish a partnership *in fact*, by testimony of the character above mentioned, this evidence was competent, and should have been received.

We are at a loss to understand upon what ground the evidence was excluded. If the plaintiff had asked a recovery upon the sole ground that the defendant had held himself out to the plaintiff as a partner, and was therefore liable whether an actual partner or not, then it might have been urged, with some plausibility, that

the evidence was not material, as directed to a matter of fact of no practical importance in the case; for if the defendant had held himself out to the plaintiff as a partner, and the latter had dealt with the firm in good faith, relying upon the responsibility of the defendant, then it would be no answer to the claim of the plaintiff to say that the defendant was not a partner. Even then, however, if the plaintiff had given testimony tending to show that the defendant had constituted a third person his agent, and instructed such agent to sign articles of co-partnership for him, and this was relied upon as a circumstance to show that the defendant had held himself out to the world generally as a partner, the defendant might, for the purpose of negativing the inference sought to be drawn from this circumstance, show that the supposed authority had been withdrawn before it had been acted upon. It will be remembered that the plaintiff does not claim that it had any knowledge of the alleged transactions connecting the defendant with Whiteside as his agent or with the partnership, shown in the bill of exceptions. The plaintiff does not pretend that it was present by any officer or agent, when, as it is claimed. Whiteside was authorized by Thompson to act for him; or that any information concerning this matter ever came to it, or to any of its agents or officers. The plaintiff below, therefore, was not induced to give credit to the partnership by reason of any understanding on its part that Whiteside had been authorized by Thompson to sign his name to the articles of partnership, and that the articles had been signed

accordingly. It follows that upon this aspect of the case, which might involve the doctrine of estoppel *in pais*,—as well as upon the direct issue of partnership, or no partnership, it was competent for the defendant to prove, in answer to the testimony of the plaintiff, that any supposed authority with which Whiteside had been invested by the defendant to sign his name to the articles of co-partnership, had been expressly withdrawn before any action had been taken upon it. It was a question of authority in Whiteside to act. The testimony of the plaintiff tended to show that Whiteside had been authorized to act, and hence that Thompson was bound by his act. The defense offered to prove that the supposed authority had been withdrawn before anything had been done under it, and hence that Thompson was not bound. The Court refused to allow this testimony to be given; holding, in effect, that the supposed authority given to Whiteside was irrevocable.

Closely connected with the point above discussed is the question arising upon the second assignment of error.

Second. Said Circuit Court erred in refusing to permit the defendants below to give testimony offered by them of the contents of a letter to William H. Whiteside, written at the dictation of and signed by said E. R. Thompson in April, 1871, enclosing an assignment to said Whiteside of shares of stock in said Peoples' Bank, subscribed by said Whiteside in the name of said Thompson, as shown in the record.

In reply to testimony introduced by the plaintiff below, seeking to fix responsibility upon Thompson by reason of the acts of Whiteside, the defendants below gave testimony to the effect following:

The testimony of the said defendants also tended to show that in the month of April, 1871, and before or about the time said partnership commenced business as aforesaid, the said Thompson, at Delaware, Ohio, received a letter from said William H. Whiteside, purporting to come from Logansport, Indiana, enclosing an assignment to the said Whiteside (except the signature) from the said Thompson, in the handwriting of the said Whiteside, of the stock in said partnership subscribed in the name of said Thompson by the said Whiteside as aforesaid, in April, 1871; that the said Thompson, after he caused to be added the words "which you took for me" to said assignment, signed his name thereto, and enclosed the same, in a letter written at his dictation and signed by him, to the said Whiteside at Logansport, Indiana, aforesaid; that said letter with said enclosure was mailed as aforesaid, and was received by said Whiteside, at Logansport, in the month of April, 1871, and was by him shortly thereafter pasted in said stock book at the place where the name of said Thompson appeared as aforesaid, and there remained until shortly before said failure; that in the month of May, 1873, said stock and $200 credit were carried by said Whiteside into the stock account of the said Whiteside with said partnership. (Printed Record, pp. 14-15).

"The defendants also gave testimony proving that the letter of said Thompson enclosing said assignment of stock aforesaid had been lost after the same had

been received by said Whiteside, and they offered to prove the contents thereof;" but the court excluded the testimony so offered, and the defendants excepted. (Printed Rec., p. 15).

The testimony given by the defendants tended to show that Mr. Whiteside, in signing the name of Thompson to the articles of co-partnership, had acted, not only without authority, but contrary to the express instructions of said Thompson, in the hope, however, that the latter might be persuaded to adopt and ratify the unauthorized act; disappointed in this, Whiteside prepared an assignment to himself of the shares so subscribed, and forwarded it from Logansport, Indiana, to Mr. Thompson, at Delaware, Ohio, to be signed by Thompson and returned to Whiteside by mail. The proposed assignment was received by Thompson, at Delaware, Ohio, in April, 1871. He added to it the words "which you took for me;" signed and dated it; dictated a letter to Whiteside; signed this letter; enclosed the assignment in the letter, and mailed it to Whiteside, who received the letter and enclosure at Logansport by due course of mail. It was proved that this letter had been afterwards lost. The defendants below offered to prove the contents of this letter, but the Court refused to admit the testimony. We claim, in behalf of the plaintiffs in error, that as against a creditor seeking to establish a partnership in fact as against Thompson, the testimony excluded was competent to be considered by the jury in connection with the other testimony given in the case; especially that

bearing upon the question of the authority of Whiteside to sign the name of Thompson to the partnership articles. The letter and the assignment to Whiteside enclosed in it, constituted, in effect, a single transaction, and they should have been considered together. All this occurred long before the Bank had any transactions, with the alleged partnership. (Printed Rec., 13).

The third and fourth assignments of error may be considered together.

Third. Said Circuit Court erred in refusing to instruct the jury as requested by the defendants below.

Fourth. Said Circuit Court erred in the instructions given to the jury in said case and excepted to by the plaintiffs in error.

We have already called attention to the fact that in its petition, the plaintiff below charged that the defendant, Thompson, was a partner in the firm known as the "Peoples' Bank:" but that there were no allegations that he had become connected with the firm at a date earlier than May 5, 1877. On the trial the plaintiff sought to establish by testimony, that the defendant, Thompson, if not in fact a partner, had knowingly permitted himself to be held out to the public as a partner. But the plaintiff gave no testimony tending to show that while doing business with the partnership, or before that time, it had knowledge of such alleged "holding out" on the part of Thompson, or of

any of the facts or circumstances connected therewith. We quote from the bill of exceptions:

The testimony of the plaintiff also tended to show that it commenced doing business with said "Peoples' Bank" in October, 1873; that an account was opened with said bank at that date, which was continued until the failure in August, 1877, as aforesaid. *But no testimony was given showing that the plaintiff or any of its officers had any knowledge during said period as to the persons who constituted said partnership; or of said advertisements published in the papers of Logansport as aforesaid; or of the fact that the name of said Thompson appeared upon said checks and certificates of deposit, or in said circulars as aforesaid, as one of said partners; or that said plaintiff or any of its officers, servants, or agents had knowledge of said conversations with said Thompson concerning his said alleged connection with said firm, or of any of said alleged statements by him relative to said matters, or that said Thompson had ever held himself out to the plaintiff as a member of said firm.* (Printed Rec., p. 13.)

After the testimony had been closed, and during the argument of the case, counsel for said defendants requested the court to instruct the jury, that if they found from the testimony that the said E. R. Thompson was not in fact a member of said partnership, the plaintiff could not recover, unless it further appeared from the testimony that the said Thompson had knowingly permitted himself to be held out as a partner and that the plaintiff had knowledge thereof during its transactions with said partnership. The court refused

to instruct the jury as requested, but, on the contrary, charged the jury as follows:

"The defendants' counsel insist that no recovery can be had on this ground, unless the plaintiff shows by the evidence upon the trial of the cause that he gave credit to the bank, looking to the defendant as a part of it; in other words, that the credit was extended in part to the defendant Thompson. We entertain a different opinion. It is not necessary for the plaintiff to show here that at the time it discounted the acceptance sued on he especially relied upon the defendant Thompson for its payment. If Thompson had held himself out to the world in this public manner, through these advertisements and the other means brought to your attention, as an interested party, as liable for the obligations of the bank, the plaintiff is entitled to the benefit of that fact, without showing that he knew that Thompson was a partner in the bank, or without showing that he specially gave credit to this particular defendant. This publication is of such a character as to entitle the plaintiff to rely upon it, without such proof as the defendants' counsel insist ought to be made here; that is, that the plaintiff knew of these advertisements, etc., and relied upon Thompson for the payment of this debt."

"If he was not at any time a partner, but still permitted the officers of said bank to hold him out by advertisements and otherwise, as shown in the evidence, and permitted himself to be introduced as a director and stockholder, as is shown by the evidence, if he permitted that to be done, then, as between him and third parties such as the plaintiff, he is estopped from

denying his liability as a partner." (Printed Rec., pp. 15, 17, 18.)

After the Court had declined to charge as requested upon the question of law presented, and had charged a contrary doctrine, the following additional request was made by counsel for defendants:

I ask the Court to say to the jury that in the event they should find that Mr. Thompson withdrew from all connection with the association before it embarked in business in 1872, then that the rule that the court laid down is not applicable.

The Court replied: If, gentlemen of the jury, he had withdrawn from the Peoples' Bank before it was organized, the proposition would still remain true: that if he permitted himself to he held out to the world by these publications and otherwise, as shown in evidence —and you will decide how far he permitted it—if he permitted himself to be thus held out as a stockholder or partner, thereby acquiescing in the representations made, the world had a right to treat him as a partner, and he would be liable accordingly.

Exceptions were taken to these rulings of the Court as already mentioned.

We submit that the Circuit Court erred in refusing to instruct the jury as requested, and in the instructions given. And upon this proposition we respectfully ask the attention of the Court to the following authorities:

"The doctrine that a person holding himself out as a partner and thereby inducing others to act on the

faith of his representations, is liable to them as if he were in fact a partner, is nothing more than an illustration of the general principle of estoppel by conduct." (1 Lindley on Partnership, 3d English edit. 48; Amer. edit. by Ewell, Vol. 1, 48.)

"The expression in *Waugh* v. *Carver*, 'if he will lend his name as a partner he becomes as against all the rest of the world a partner,' requires qualification; for the real ground on which liability is incurred by holding oneself out as a partner, is, that credit has been thereby obtained. This was put with great clearness by Lord Wensleydale in *Dickinson* v. *Valpy*, [10 B. & C. 140], in which he said, 'If it could have been proved that the defendant had held himself out to be a partner, not to the world, for that is a loose expression, but to the plaintiff himself or under such circumstances of publicity as to satisfy a jury that the plaintiff knew of it and believed him to be a partner, he would be liable to the plaintiff in all transactions in which he engaged, and gave credit to the defendant, upon the faith of his being such a partner. The defendant would be bound by an indirect representation to the plaintiff arising from his conduct as much as if he had stated to him directly and in express terms that he was a partner and the plaintiff had acted upon that statement.'" (Ibid, pp. 49, 50).

"See, too, *Vice* v. *Anson*, 7 B. & C., 409, where the defendant held herself out as a partner, but not to the plaintiff." (Ibid, note).

"It also follows that no person can be fixed with liability on the ground that he has been held out as a partner, unless two things concur, viz., first, the alleged act of holding out must have been done either by him or by his consent, and, secondly, it must have been known to the person seeking to avail himself of it. In the absence of the first of these requisites, whatever may have been done can not be imputed to the person sought to be made liable; and in the absence of the second, the person seeking to make him liable has not in any way been misled." (Ibid. p. 50. See, also, the cases cited and examined by the author in support of the foregoing doctrine.)

Mr. Ewell, in his notes to the American edition of Lindley on Partnership, says:

"Where an individual represents himself as a partner in a certain firm, or permits others so to do, or to hold himself out as such, or by his acts or declarations, creates in the mind of another a reasonable belief that he is a member of a certain firm, he is liable to the person so believing, on a *bona fide* contract made by the latter with a member of such firm, as such, in the regular course of such business, although in fact no such partnership existed." (1 Lindley on Partner. by Ewell, p. 47, note. Many American cases are cited in support of this view.)

"If one holds himself out to be a partner of another, that does not make him in fact a partner, nor render

him liable as such, except to those who are thereby led to believe he is a partner, and who give credit to the supposed firm upon such belief. *Wood* v. *Pennell*, 51 Me. 52; *Irvin* v. *Conklin*, 36 Barb. 64." (Ibid. p. 48, note.)

"To establish a liability against a party as a partner, for the acts of others, it must be made to appear that a copartnership was proved by express agreement, or that there was an authorization in advance and a consent to be bound by such acts as a partner, or a ratification of the acts after performance, with full knowledge of all the circumstances, or some act by which an equitable estoppel has been created. *Central City Savings Bank* v. *Walker*, 66 N. Y., 424." (Ibid. p. 47, note.)

The doctrine is very clearly stated in Pollock on Partnership, Amer. edit., pp. 22-24, ch. 3, as follows:

"ARTICLE 13. *Persons liable by 'holding out.'* "'A person who has by words spoken or written, or by his conduct, led another to believe that he is a partner in a particular firm, is responsible to him as a partner in such firm.'" I. C. A. [Indian Contract Act], 245.

"ARTICLE 14. Whoever knowingly suffers himself to be represented as a partner in a particular firm, is liable as such partner to any one who has, on the faith of such representation, given credit to the firm."

"*This rule as a branch of estoppel.* "'Where a

man holds himself out as a partner, or allows others to do it, he is then properly estopped from denying the character he has assumed, and upon the faith of which creditors may be presumed to have acted. A man so acting may be rightly held liable as a partner by estoppel. [Per Cur., *Mollwo, March & Co.* v. *Court of Wards*; L. R. 4 P. C. at p. 435.] The rule is, in fact, nothing else than a special application of the much wider principle of estoppel, which is, that, if any man has induced another, whether by assertion or by contract, to believe in and to act upon the existence of a particular state of facts, he can not be heard as against that other to deny the truth of those facts. [For fuller and more exact statements see *Carr* v. *London & Northwestern Railway Co.*, L. R. 10 C. P. at pp. 316, 317; Stephens' Digest of the Law of Evidence, 105, Art. 102."]

"*What amounts to holding out.* To constitute 'holding out' there must be a real lending of the party's credit to the partnership. The use of a man's name without his knowledge can not make him a partner by estoppel. Also the use of his name must have been made known to the person who seeks to make him liable; otherwise there is no duty towards that person. There may be a 'holding out' without any direct communication, by words or conduct, between the parties. One who makes an assertion intending it to be repeated and acted upon, or even under such circum-

stances that it is likely to be repeated and acted upon by third persons, will be liable to those who afterwards hear of it and act upon it. 'If the defendant informs A. B. that he is a partner in a commercial establishment, and A. B. informs the plaintiff, and the plaintiff, believing the defendant to be a member of the firm, supplies goods to them, the defendant is liable for the price.' "

In the case of *Martyn* v. *Gray*, 14 C. B. (N. S.) 824, cited by Mr. Pollock, Erle, Ch. J., says, p. *839: "Formerly it was considered sufficient if the party was held out to the world as a member of the firm or company. Now, however, it is necessary that there should be direct evidence that the holding out should come to the knowledge of the plaintiff; he need not hear or see the defendant's conduct; it is enough if the fact has come to his knowledge." See also the views of Williams and Willes, J. J., in the same case.

The volume of the Common Bench Reports above cited forms volume 108 of the English Common Law Reports. The American editor in his note to the case of *Martyn* v. *Gray*, at page 844 of the reprint, cites a number of American cases holding the doctrine of the principal case.

"Where the conduct of a party is relied upon to charge him as a member of a firm of which he is not in fact a member, it should appear that the creditor relied on such conduct, and trusted the firm on the faith of such

party being a member." *Cook* v. *Slate Co.*, 36 Ohio St. Rep. 135.

See, also, Smith's Lead. Cases 6th Amer. edit., vol. 1, part 2, pp. 1190-91, top paging; [*981-82] side paging; Story on Partnership, sec. 65; Bigelow on Estoppel, 1st edit., 468.

The fifth and sixth assignments of error are formal in their character, and will not be discussed. But for the reasons already urged, it is respectfully submitted that the judgment of the Circuit Court should be reversed and a new trial awarded.

C. H. SCRIBNER,

of Counsel for Plaintiffs in Error.

111-329

OFFICE SUPREME COURT U. S.
FILED
APR 21 1884
JAMES H. McKENNEY, Clerk.

Supreme Court of the United States.

ADMINISTRATORS OF E. R. THOMPSON,
DECEASED,

Plaintiffs in Error,

No. 344. *v.*

THE FIRST NATIONAL BANK OF TOLEDO,
OHIO,

Defendant in Error.

REPLY TO ARGUMENT FOR DEFENDANT.

C. H. SCRIBNER,
Attorney for Plaintiffs in Error.

THE B. F. WADE CO., PRINTERS, TOLEDO

satisfy the jury that Thompson was seeking to bring about the formation of a partnership, and had authorized Whiteside to act as his agent in consummating the proposed arrangement and putting it into form.

All this was denied by the defence.

And it was competent on the part of the defence, not only to negative the proofs given by the Bank tending to show that Thompson was engaged in promoting the formation of the partnership, but also to give affirmative evidence showing that Whiteside had been forbidden to use the name of Thompson in the business. Counsel upon the other side assume, that because they had introduced evidence tending to show that Thompson had agreed to become a partner, and had authorized Whiteside to act for him, we were precluded from attempting to show a contrary state of facts.

They suggest that a parol contract of partnership had been entered into before the execution of the partnership articles; that Thompson, in the presence of other members of the firm, had authorized Whiteside to act for him; and that it would be unfair to them to allow Thompson secretly to withdraw the alleged authority given to Whiteside.

1. As before noticed, counsel improperly assume that the case made by *their* witnesses is to govern and control the court in determining questions arising as

to the admissibility of testimony offered by us. On the part of the defence, as the record shows, evidence was given flatly contradicting the testimony of the plaintiff below as to the alleged preliminary agreement, or authority to Whiteside. We insisted that the testimony of the plaintiff, upon this branch of the case, was untrue, and this was one of the issues of fact presented to the jury.

2. To aid the jury in arriving at a just conclusion upon this conflict of testimony, it was proper that they should consider, in connection with it, the fact, if the testimony offered and rejected would have satisfied them it was a fact, that Thompson, before the execution of the partnership articles, had forbidden Whiteside to use his name. The testimony offered and rejected had a direct and important bearing upon the question as to whether or not Thompson was in fact a partner, or had knowingly permitted himself to be held out as a partner. The plaintiff having given testimony tending to show that Whiteside had executed the partnership articles by authority of Thompson, and put the articles in evidence, it was our right to contradict this evidence, and prove that at the time of the execution of the articles he had no such authority.

3. Even if a preliminary partnership agreement had been proven as against Thompson, nevertheless, as to a creditor whose transactions with the partnership

commenced long afterwards, it was competent for the former to prove that he had withdrawn from the proposed arrangement before the commencement of the business. I speak now with reference to the claim of the plaintiff that Thompson was an actual partner, as was alleged in the petition, and sought to be proven on the trial. This is not a contest among the alleged partners. There is no question here as to whether Thompson is estopped, as to Uhl or certain other members of the partnership, from denying that he was a partner. Neither of the other alleged partners has been brought in by service or appearance, and no judgment in this proceeding can affect them. And in no event could the question of estoppel, as between the defendants, be determined in this action.

4. The fact that we gave proofs tending to show that Whiteside had never been authorized to act for Thompson, does not preclude us from also showing that the former had been explicitly instructed by the latter that he would have no connection with the business; especially as this instruction was given, as we claim, after the date when it is alleged that Whiteside had been authorized to act. There is nothing inconsistent in this. The persistency with which Whiteside was seeking to commit his father-in-law to the enterprise explains why the instruction was given.

II. We offered to prove the contents of the lost

letter in which the assignment of stock was returned to Whiteside. We did not state at the time what the contents of the letter were. The proof was offered as explanatory of the act of returning the assignment, as part of the *res gestæ*, or of the act itself. We tendered proof of the contents of the letter, just as we would have tendered the letter itself, had it been present. Whatever the contents were, whether for us or against us, we were entitled to have them go to the jury along with the paper which the letter enclosed.

III. The question arising upon the refusal of the Court to charge as requested, and upon the exception to the charge as given, I do not desire to re-argue. This question is fully discussed, and the authorities collected, in the opening argument. There seems to be a conflict in the authorities; but many of the later cases, and several of the ablest text-writers maintain the proposition upon which I rely.

C. H. SCRIBNER,

Attorney for Plaintiffs in Error.

OFFICE SUPREME COURT U. S.
FILED
APR 18 1884
JAMES H. McKENNEY, Clerk.

11-529

Supreme Court of the United States.

JOHN P. THOMPSON AND EDWARD R. THOMPSON, JR., ADMINISTRATORS, ETC., OF E. R. THOMPSON, DECEASED,

PLAINTIFFS IN ERROR,

v.

THE FIRST NATIONAL BANK OF TOLEDO, OHIO.

DEFENDANT IN ERROR.

In Error to the Circuit Court of the United States for the Northern District of Ohio.

WESTERN DIVISION.

Argument for Defendant in Error

By BISSELL & GORRILL,

Attorneys for Defendant.

MONTGOMERY & VROOMAN, PRINTERS, TOLEDO, O.

Supreme Court of the United States.

JOHN P. THOMPSON AND EDWARD R. THOMPSON, JR., ADMINISTRATORS, ETC., OF E. R. THOMPSON, DECEASED, **PLAINTIFFS IN ERROR,** *v.* *THE FIRST NATIONAL BANK OF TOLEDO, OHIO.* **DEFENDANT IN ERROR.**	*In Error to the Circuit Court of the United States for the Northern District of Ohio.* **WESTERN DIVISION.**

Argument for Defendant in Error
By BISSELL & GORRILL,
Attorneys for Defendant.

The first assignment of error by plaintiff in error, (P. 18, Plff's brief.) is "the refusal by the Court to permit the defendants below to prove by Whiteside and wife, that before the alleged partnership articles were signed, as shown in the record, and before said partnership commenced business,

Thompson instructed Whitesides that he would not become a partner in said business.

In considering this assignment of error, let us see how the matter was presented to the Court below:

Upon page 11, printed record, it had been shown that at a meeting of the persons who afterward acted as partners under the name of "People's Bank," in winter of 1870-1871, etc, at Logansport, Indiana, Thompson, representing himself as a capitalist, in company with his son-in-law, Whiteside, was endeavoring to induce others to join them in forming the Bank in question. That at this meeting, Thompson and Uhl agreed to put in $2,000 each.—"take stock"—as they called it, that Uhl's agreement was induced by Thompson's, and in the presence and hearing of several of the persons interested, authorized Whitesides to sign his name to the articles of partnership when drawn, etc. It does not appear that anything was left to be done except to put the partnership contract in writing and subscribe it, and this last act Thompson authorized Whitesides to do for him. Thompson and Uhl had agreed with each other to join the partnership, and stipulated as to the amount each was to put into the scheme, and Thompson stipulated that Whitesides should be cashier.

So far as the record shows (upon the case made by Plaintiff below) the bargain had been struck—was as complete as it would be after the evidence of the contract should be reduced to writing and signed This was a mere partnership and no law required the contract therefor to be in writing. Upon Plaintiff's case, we repeat Mr. Thompson had made his partnership contract in person, and the specific act which he

authorized Whitesides to do for him was to sign his (Thompson's) name to the articles. Thompson resided in Delaware, Ohio, and evidently did not expect to be present.

To meet this proof, they offer to show that "Thompson instructed Whiteside that he would not become a partner."

It is not pretended that they could or would prove that any information had been given to the other parties who had agreed to embark in the business, but on the contrary the defendants had before that time admitted that Whitesides at the organization had signed Thompson's name to the articles, had entered the name of Thompson on the books as a stockholder, had paid in the ten per cent. assessment on "Thompson's stock," and to put Thompson's ownership of the stock named beyond question, had introduced in evidence an assignment in writing from Thompson to Whitesides of this stock so taken, which was executed after the partnership had commenced business.

The evidence offered, if admissible, must needs operate to establish something.

Could it operate as a recision of the partnership agreement without coming to the knowledge of the parties with whom the contract had been made? Could it operate as a revocation of any authority conferred upon Whiteside by Thompson? It did not in terms purport to be a revocation of such authority. We contend that the authority so conferred could not be secretly withdrawn.

That the promoters of such schemes cannot be permitted

to draw inexperienced persons into ventures upon the promise to furnish experience, capital and responsibility necessary to assure success, and then secretly withdraw an authority publicly given to bind them to the fortunes of the adventure, so that, through an insolvent relative, they may share the profits of the venture if successful, or, safely flee from the wreck if disaster overtake it.

Joseph Uhl had the right to insist that Mr. Thompson should assist him to pay the debts of that partnership, if plaintiff's testimony is true, and the rights of Joseph Uhl are available to plaintiff for the collection of its claim.

Thompson stipulated that he would put in $2,000 if Uhl would consent to go in. Thompson stipulated that Whiteside should be cashier of the bank. Uhl put in his money and became responsible. Whiteside became cashier and so had the usual opportunities of the bank cashier. Will the law permit the open agreement to be apparently performed, so as to mislead those who trust it, and then, by the advancement of a secret instruction by the principal to the agent, enable the principal to escape the liability so apparently assumed? It does not seem necessary to do more than hint at the effect upon society of such a rule of law.

But suppose Thompson did notify Whiteside that he would not be a partner, how could that operate to affect his liability? Whiteside had just sworn that Thompson had not agreed at any time to become a partner, and had never authorized him to sign his name as such. If that was true, then how could his testimony that Thompson at some time

and place other than those named, said he would not become a partner. If no authority had been conferred by Thompson on Whiteside there was nothing to revoke. If Thompson had made no bargain as to partnership with the parties there was nothing to rescind. Whiteside as a witness had been used as potentially as it was possible to use him. If the question had been directed to what Thompson said when in negotiation with the other parties, it would have called for some part of the negotiation or contract, but as it was, it called for neither. Plaintiff proved a contract, and for defendant to offer to prove that at some time he said to some one that he would not abide by the contract, would hardly tend to prove he had not made such contract. Or, to go one step farther, if he had brought a witness who offered to swear that after the date of the alleged contract defendant told him that he did not make such contract, what court would tolerate such testimony? The law demands the best evidence, and when Whiteside had sworn that Thompson had never authorized him to act in the formation of the partnership we submit, upon their proof there was no *authority* to be *withdrawn*, and the testimony offered could not be reconciled with what they had already offered.

We have said that if there had been authority given to Whitesides by Thompson, it was not secretly revocable, but, as to third persons such form of revocation would have no effect whatever, and the acts of such agent done in pursuance of the original or apparent authority, are as binding on the principal, as though no effort had been made to revoke the authority.

Story on Agency, §470 §471 8th Edn.

Hence, as defendants did not claim that the pretended revocation was brought to the notice of the fellow partners, the execution of the partnership contract by Whitesides for Thompson, was as valid as though Thompson had signed it in person.

Being valid between the partners, it established the partnership relation and was the only artificial body of that name with whom the world had to deal.

The plaintiff's argument may include the idea that as we did not deal with Whiteside under the authority, the revocation while inoperative as to those who acted upon the faith of the authority, is operative as to a stranger.

It would be as logical to claim that a deed executed by an agent under like circumstances would be valid as to the immediate grantee, but a remote grantee could not avail himself of the same protection.

The second error assigned we think should be disposed of without much ~~legislation~~ hesitation.

6-O. St. 288
9-O. St. 1
11-O. St. 116
14-O. St. 676

The error complained of is the refusal by the Court to permit the plaintiff in error to prove the contents of an *alleged* letter claimed to be lost. It will be noticed that the record is silent as to what the plaintiff in error expected to show by the proof offered. No suggestion is made showing what the party expected to prove, nor how they could have been injured by the refusal complained of.

The rule is well established by numerous decisions that "to render an exception available it must affirmatively ap-

Railroad. Company, v. Smith. 21, Wallace 255-261.

Rule 21 of Supreme Court.

Packet Co. vs. Clough. 20, Wallace 542

pear that the ruling excepted to affected—or, might have affected the decision of the case." * *. If the exception is to the refusal of an interrogatory. not objectionable in form, the record must show that the answer related to a material matter involved; or, if no answer was given. the record must show the offer of the party to prove by the witness particular facts, to which the interrogatory related, and that such facts were material."

If the evidence offered were not covered by the rule mentioned, its admission was objectionable for the same reasons stated as to "first error." The statement was that Whiteside had written a letter to Thompson inclosing an assignment of stock, that Thompson had answered such letter returning the assignment, and, defendant not offering in evidence the letter received, offers to prove the answer by him to such letter, and urges as a reason that the letter was part of the transaction, and hence should have been admitted. If the reason is good the offer did not satisfy any such supposed rule, as the transaction would not stand so clearly shown with one letter in evidence as with neither.

We may fairly presume that the letter simply stated that the letter and inclosure had been received and the assignment was inclosed signed as requested. What light would that have thrown upon the transaction. Supposing the letter from Whiteside to Thompson suggested the form of answer which would best serve their purpose, would the cause of justice be advanced by receiving the decoy as the *true* evidence of the transaction? If their objection is good,

the refusal of a Court to receive in evidence in an ejectment suit, the letter accompanying a deed from vendor to vendee, would also be error.

In answering the 3rd and 4th assignments of error as numbered in Plaintiff's brief, we first call attention to the recordlas printed, (p. 13), where the usual phraseology "gave testimony tending to show," is changed to this—"but no testimony was given *showing that the plaintiff*, etc., had any knowledge * * as to the persons who constituted said partnership.

We submit that all of the evidence showing that E. R. Thompson was as generally held out to the world as a partner, as any of the other partners in said firm raised the presumption fairly, that, by the same means through which the Plaintiff in Error came to know that there was such a firm as the one in question it would be informed as to who composed such firm, without the specific proof that its president or other officers had knowledge on the subject.

Of course the instruction asked for by defendants below was erroneous in the light of the evidence in the case, (see page 15 printed record)—"that if the jury found from the testimony that the said E. R. Thompson was not in fact a member of said partnership the plaintiff could not recover, unless it further appeared from the testimony that the said Thompson had knowingly permitted himself to be held out as a partner, and that the Plaintiff had knowledge thereof during its transactions with said partnership."

The testimony of the plaintiff below tended to show

that Thompson had held himself out as a partner at various times and in a public manner about the place of business of the firm, all of which facts the jury were entitled to consider as well upon the second as the first proposition, and all of the representations of this character, were undisputed by any witness claiming knowledge of the facts.

The charge above requested by plaintiffs in error entirely ignored this part of the case, hence we say it is plain that the Court did not err in refusing so to charge.

The request by Mr. Scribner on page 18, printed record, was also erroneous, and if proper to have been given as a limitation to some part of the charge, could with no propriety have been offered to annihilate the whole charge as it was calculated to do, if given.

Passing to the consideration of the question of error in the charge as given, we contend that the charge is according to principle and authority as favorable to plaintiffs in error as the facts proven would warrant.

We admit that the cases upon this point are not reconcilable, but it will be found that many decisions turn upon the particular facts of the case and where adverse to our position the facts were different.

We submit that upon principle there may well be grounds for a different decision in a case where it is admitted that the party sought to be charged, never was a partner, and only in respect to an isolated transaction held himself out as a partner or knowingly permitted others to do so.

and the case of one whose name from the inception of the business, down through all its business growth and its decline to insolvency, was as generally and publicly held out as a partner as any other person admitted to be a partner in such firm. In the one case it is not to be assumed that the isolated representation came to be matter of common fame, and was calculated to attract the confidence of the world to such an extent that a particular dealer might fairly be presumed to have dealt with reference to such knowledge; hence the rule would be productive of little or no injustice, which would require the person alleging such representation to prove that it came to his knowledge before he gave the credit.

In the other case the fact that the mercantile community admitted the firm to the markets of the world, as reputable and worthy of credit, presupposes that the individuals reputed to be members of the firm, have been estimated and their financial standing approved, but if each member of the commercial world were callled upon for the source of his information, who could answer. The members of the immediate community might be able to name persons because personally acquainted with them, but the great world ontside trade upon the strength of the home reputation for solvency and know the firm only through that medium, or by its representative traveling salesmen.

The rules which were applied among the English merchants of a century ago, would work great injustice now. Formerly the course of trade was such that each merchant knew his customer, and they did their own bargaining together.

Now the wholesale merchant has no personal acquaintance with a majority of the men and firms named on his books. His traveling men change routes, leave his employ, and sometimes die. He understands that Green & Jones are responsible for a certain line of credit, but if called to the witness stand and asked if he understood that Simon Jones was a member of that firm, and if yes, did he rely upon Simon when he sold to Green & Jones the last bill of goods, he would be compelled to admit that he did not know who composed the firm. He relied upon their home reputation and that had been good. Then if the Court should say to him that the reputation for solvency of that firm was predicated upon the wealth of Simon Jones, who had been known at home through his own representations from the beginning of the business as the solid man of the firm, but that upon investigation Simon was ascertained to be only the *father-in-law* of the firm, and had never been a member, and hence as he was not privileged to know Simon's game he must lose his debt, would he believe the Court was administering justice? We submit he would not.

"Without other evidence of a partnership in fact as between the defendants, liability of a defendant as if a copartner is established by evidence that he held himself out or suffered himself to be held out to the world as a partner, and for this purpose it is not necessary at least in the first instance to prove a representation to the plaintiff. Where it is proved that they advertised that they were partners it may be presumed that the plaintiff's subsequent dealings were on the faith of the partnership."

Abbott's Trial evidence, p. 208.

Note to same.

"Some authorities hold that plaintiff must prove that he dealt on the faith of the representations, &c.

These rulings are not well considered."

Hence we claim that if the defendants intestate so conducted himself as to justify the community in the belief that he was a member of the "People's Bank," and took such steps as to induce his fellow partners to believe he was jointly responsible with them for the debts which said bank should contract, there is a double reason for holding his estate responsible to the creditors of said firm.

First, because the firm presumably obtained *credit* and were generally trusted because of such belief.

Second, because his conduct so led his partners to embark in a business which having proven disastrous, should not be borne by them *alone*.

Colyer on Partnerships. Sec. 84. P. 84. Perkin's Edition.

"If a person suffer his name to be used in a business, or otherwise hold himself out as a partner he is so to be considered whatever may be the agreement between him and the other partners. In such case he will be equally responsible with the other partners although he may receive no profits; for the contract of one is the contract of all.

"*This rule of law arises* not upon the ground of the real transaction between the partners, *but upon principles of general policy*, to prevent the frauds to which creditors would be liable, etc."

In commenting upon Young *vs.* Axtell, the author says,

"It appears from this case that it is not necessary for a person charging a nominal partner, to have been aware of the partnership at the time of the contract.

Do p. 85.

In a note by the American Annotator many of the authorities cited by Plaintiff in Error are collected, and in conclusion says—"The object of the rule given above by Mr. Colyer, that it is to prevent the extension of *Unsound Credit* is not, however, met by the above suggestions.

Do p. 86.

The like docirines are stated very clearly and forcibly by Judge Story, who adds: "Upon so clear and natural a doctrine it seems unnecessary to cite at large the authorities in its support. They are uniform and positive to the purpose."

Story on Partnership, Sec. 61 & 65.

In Kelly v. Scott et. al. 49 N. Y. 595, 599 Court say: "are we not bound to assume that the creditors relied upon the personal responsibility of the persons named as composing the firm.

So in Greenleaf Evidence Vol. 1, Sec. 207, the rule is clearly stated: "Admissions whether of law or fact which have been acted upon by others are conclusive against the party making them, in all cases between him and the person whose conduct he has thus influenced. It is of no importance whether they were made in express language to the person himself or implied from the open and general conduct of the party.

For in the latter case the implied declaration may be considered as addressed to every one in particular who may

have occasion to act upon it. In such cases the party is *estopped*, on grounds of public policy and good faith from repudiating his own representations.

* * * *

"So also where one knowingly permits his name to be used as one of the parties in a trading firm under such circumstances of publicity as to satisfy a jury that a stranger knew it, he is liable, &c. "

If the case were one of first impression, Courts would probably hold the nominal partner bound upon principles of agency, raising an authority on the part of the real partners to bind him by their acts.

Parsons on Partnership. P. 119.

"Where one is held forth to the world as a partner, the first question is, was he so held out by his own authority, assent or connivance, or by his negligence. If by his authority, consent or connivance, *the presumption is absolute* that he was so held out to every creditor or customer, &c."

Poillon et. al. v. Secor. 61 N. Y. 456

One who, for a valuable consideration, authorizes the use of his name in a copartnership as if he was a member thereof, is liable as a partner to a subsequent creditor of the firm; and this, although the creditor was ignorant of the arrangement, or that the name represented such nominal partner, and did not give credit on the faith of his apparent connection with the firm."

We submit that the *consideration* is of no consequence to sustain the principle because the effect upon the creditor is the same in one case as the other.

Cited In Waugh, v. Carver. 2 H. Blackstone. P. 24.

Lord Mansfield said in Young v. Axtell, "That as Mrs. Axtell suffered her name to be used in the business, and held herself out as a partner, she was certainly liable, though the plaintiff did not, at the time of dealing know that she was a partner, or that her name was used."

2nd H. Blackstone P. 246

So in the principal case Lord Chief Justice Eyre said, "If one lends his name as a partner, he becomes as against all of the rest of the world, a partner, not upon the ground of the real transaction between them, but upon principles of general policy to prevent the frauds to which creditors would be liable."

Guidon v. Robson. 2nd Campbell's Reps 304.

Lord Ellenborough said, "Where the name of a person is inserted in a partnership title with his consent, it matters not what agreement there may be between him and those who share the profit and loss. They are equally responsible and the contract of one is the contract of all."

As a final consideration we submit that when a party gives publicity to a false statement or knowingly permits it to be done in respect to a business state or transaction touching himself, the presumption is that the *intent* is to influence others by the simulated condition, and the other natural presumption follows that it has the effect intended, and when a party is charged with liability thereon, good morals and the stability of business affairs require the protection of the innocent, rather than the guilty.

BISSELL & GORRILL,

Counsel for Defendant in Error.

Edward Bissell,
Counsel for Defendant